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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

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vol. 10
no. 19

FEDERAL COMMUNICATIONS COMMISSION

Reed E. Hundt, Chairman
James H. Quello
Andrew C. Barrett
Susan Ness
Rachelle B. Chong

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Afford-A-Call Corp., File No. E-92-59
Complainant,

v.

Cincinnati Bell Telephone
Company,
Defendant

ORDER

Adopted: August 29, 1995; Released: September 5, 1995

By the Chief, Formal Complaints & Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On April 17, 1992, Afford-A-Call Corp. ("Afford") filed the above-captioned complaint against Cincinnati Bell Telephone Company ("Cincinnati Bell") alleging, among other things, that Cincinnati Bell violated Section 202 of the Communications Act by charging the higher carrier common line charge in connection with Afford's 800 telephone services. On August 11, 1995, however, the parties jointly filed a motion to dismiss this complaint with prejudice. The parties state that a mutually agreeable settlement has been reached.

2. We are satisfied that the parties' joint motion to dismiss will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources by the parties and by the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j) and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
August 18, 1995

Released: September 5, 1995

Karsten Amlie 1800C1-MGK
Leibowitz & Associates, P.A. 95070284
Suite 1450
Sunbank International Center
One Southeast Third Avenue
Miami, Florida 33131-1715

Dear Mr. Amlie:

On behalf of South Florida Public Telecommunications, Inc., licensee of noncommercial educational Station WXEL-TV, West Palm Beach, Florida, you seek waiver of Section 73.503(d) of the Commission's Rules to permit on-air fundraising for the Muscular Dystrophy Association. You wish specifically to air five and one-half hours of the Muscular Dystrophy Association's annual "Stars across America" Jerry Lewis Labor Day Telethon between 12 p.m. and 6:30 p.m. on Monday, September 4, 1995. The programming, you state, will consist of performances by individuals, interviews with disabled citizens, and mini-documentaries about neuromuscular diseases and on-going research efforts to develop a cure for them.

In support of your request, you advise that the Telethon is normally broadcast by Station WPEC-TV, a commercial station, and will be carried in part by that station this year as well. Scheduling conflicts have made it impossible for Station WPEC-TV to broadcast the entire Telethon, however, and Station WXEL-TV wishes to air the portion between 12 p.m. and 6:30 p.m. Other television stations in the community either have prior scheduling conflicts or are unable to carry the Telethon because of previous advertising commitments, you assert.

You acknowledge that Commission policy generally prohibits noncommercial stations from engaging in fundraising activities on behalf of any entity other than the station itself where such activities substantially alter or suspend regular programming. *Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, 90 FCC 2d 895, 907 (1982). This policy preserves the "primarily educational, instructional, and cultural character of public broadcast programming." *Cohn and Marks*, 51 RR 2d 659, 660 (1982). Here, you submit, the proposed programming would serve an important public interest, providing information about muscular dystrophy and other neuromuscular disorders and raising funds for a wide array of services associated with them. This, you urge, is a cause more significant than those addressed in *Cohn and Marks* (rebuilding the Filene Center at Wolf Trap Farm) and *Richard J. Bodorff*, 8 FCC Rcd 7909 (1994) (support for the St. Paul Chamber Orchestra), where waivers of Section 73.503(d) were granted. Hence, you assert, waiver is even more warranted in this case than it was in the earlier ones.

Contrary to your suggestion, our waivers in *Cohn and Marks* and *Richard J. Bodorff* were not predicated solely upon the immediacy of the needs addressed or the significance or magnitude of the problems for which funds were being raised. We permit noncommercial stations to raise funds on their own behalf "to aid in their efforts to provide the programming which they were licensed to broadcast," *Noncommercial Educational FM Broadcast Stations*, 69 FCC 2d 200, 226 (1978). In *Cohn and Marks*, we noted among other considerations justifying waiver the unique character of Wolf Trap Farm as a national cultural entity owned by the United States Government and the role of Wolf Trap Farm productions as a source of programming for public television stations throughout the country. Similarly, in *Richard J. Bodorff*, we cited the St. Paul Chamber Orchestra's long and beneficial relationship with the stations seeking waiver and its status as a significant source of programming for the nation's noncommercial radio stations.

Further and importantly, in both *Cohn and Marks* and *Richard J. Bodorff*, the problems addressed were one-time crises for which one-time fundraising events had been planned. These limitations of time and scope guaranteed that the programming would be equally limited in its impact upon the stations' regular schedules. Station WXEL-TV, in contrast, requests a waiver for fundraising that is conducted on an annual basis in connection with on-going problems, needs and interests. This is an endeavor without comparably discrete or finite limits.

We accordingly deny the request for waiver of Section 73.503(d) filed by South Florida Public Telecommunications, Inc., licensee of noncommercial educational Station WXEL-TV, West Palm Beach, Florida.

Sincerely,

Roy J. Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

HOPKINS HALL BROADCASTING, INC.
(Assignor)

and File No. BAL-950123EB

SHELBYVILLE PUBLISHING CO., INC.
(Assignee)

For Assignment of License of
WLIJ(AM), Shelbyville, Tennessee

MEMORANDUM OPINION AND ORDER

Adopted: July 31, 1995; Released: September 5, 1995

By the Commission: Commissioner Quello concurring, issuing a separate statement.

1. The Commission has under consideration the above-captioned application for voluntary assignment of the license of WLIJ(AM), Shelbyville, Tennessee from Hopkins Hall Broadcasting, Inc. ("Hopkins Hall") to Shelbyville Publishing Co. ("Shelbyville Publishing"). Shelbyville Publishing owns and operates the Shelbyville *Times-Gazette* ("*Times-Gazette*"), a daily newspaper serving Shelbyville and surrounding Bedford County, Tennessee. Since the 2 mV/m contour of WLIJ encompasses the entire community in which the *Times-Gazette* is published, Shelbyville Publishing requests a permanent waiver of the Commission's daily newspaper cross-ownership rule to permit common ownership of WLIJ and the *Times-Gazette*. A petition to deny the assignment application was filed by the Cromwell Group ("Cromwell") on March 1, 1995. Cromwell is the licensee of Shelbyville's only other AM station, WHAL, as well as WYCQ, Shelbyville's only FM station. Cromwell argues that Shelbyville Publishing has not provided sufficient justification for a permanent waiver of the daily newspaper cross-ownership rule. After consideration of all pleadings in this matter, we find it is in the public interest to deny the waiver request and to deny the above-captioned assignment application.

2. Section 73.3555(d)(1) of the Commission's rules provides that no license for an AM broadcast station will be granted to any party who owns, operates or controls a daily newspaper if the grant of such license would result in the predicted or measured 2 mV/m contour of the AM station encompassing the entire community in which such newspaper is published. A "daily" newspaper is published four or more days per week, in English, and is circulated generally in the community of publication. 47 C.F.R. Section 73.3555 note 6. The Times-Gazette is published five days per week (Monday through Friday), is published in English, and is circulated generally in Shelbyville and Bedford County. Daily circulation is 8,504 copies, and the Times-Gazette, according to Shelbyville Publishing, is an important source of local news and information.[1] Furthermore, the 2 mV/m signal of WLIJ encompasses the entire community of Shelbyville, and approximately 70 percent of Bedford County.

3. The Commission contemplates permanent and temporary waivers of the daily newspaper cross-ownership rule in four instances: (1) where there is an inability to dispose of an interest in order to conform to the rules; (2) where the only sale possible is at an artificially depressed price; (3) where separate ownership and operation of the newspaper and station cannot be supported in the locality; and (4) where, for whatever reason, the purposes of the rule would be disserved by divestiture. *Fox Television Stations, Inc.*, 8 FCC Rcd 5341, 5348 (1993), *aff'd sub nom. Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154 (D.C. Cir. 1995) ("*Fox*"); *Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order*, 50 FCC 2d 1046, 1085 (1975) ("*Second Report and Order*"), *recon.*, 53 FCC 2d 589 (1975) ("*Second Report and Order Recon.*"), *aff'd sub nom. Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978). These waiver standards were originally designed to govern divestiture of combinations formed prior to implementation of the rule, but they have also been applied to "new" combinations such as the one proposed here. *Fox*, 8 FCC Rcd at 5348 n.19.

4. Shelbyville Publishing requests a *permanent* waiver of the Commission's rule, which entails a "considerably heavier" burden of justification than a temporary waiver. *See Fox*, 8 FCC Rcd at 5348 (citing *News America Publishing, Inc. v. FCC*, 844 F.2d 800, 803 (D.C. Cir. 1988); *Health and Medicine Policy Research Group v. FCC*, 807 F.2d 1038, 1042-43 (D.C. Cir. 1986)). The Commission has only granted permanent waivers of the rule in two instances, both involving television stations. In each case, one of the cross-owned media properties faced substantial financial difficulties and the Commission was acting to preserve a media "voice." The Commission granted a permanent waiver to allow Field Enterprises, Inc., publisher of two daily newspapers in Chicago, to reacquire control of WFLD-TV, Chicago. *Field Communications Corp.*, 65 FCC 2d 959, 961 (1977) ("*Field*"). The Commission held that Field's reacquisition of the financially troubled station did not constitute a new ownership pattern, and thus was similar to ownership patterns grandfathered under the daily newspaper cross-ownership rule. *Id.* The only other permanent waiver of the rule was granted to allow Rupert Murdoch to continue to control the licensee of WNYW, New York, New York, after acquisition of the failing *New York Post*. There was evidence that Murdoch's ownership might be "pivotal to the newspaper's survival." *Fox*, 8 FCC Rcd at 5350. As in *Field*, Murdoch had previously controlled the entity to be acquired, and had a continuing financial interest in the property. *See Fox*, 8 FCC Rcd at 5342; *Field*, 65 FCC 2d at 961.

[1] *Cf. Larry Ellis Reed*, 73 RR 2d 502 (MMB 1993) (finding that a publication with a circulation of 160 was not circulated generally because it was not an important fraction of the community's media mix and was at best a secondary source of local information, emphasizing community affairs rather than local news).

5. Shelbyville Publishing requests a permanent waiver under the fourth category. A waiver is warranted under this so-called "catch-all" provision when it can be shown "for whatever reason," that the purposes of the rule would be better served by the proposed ownership pattern. *Fox*, 8 FCC Rcd at 5348. This waiver category countenances a myriad of arguments pertinent to the exigencies of a particular situation, and we will consider all "special circumstances" that applicants believe have a bearing on the appropriateness of granting a waiver. *Id.; Second Report and Order*, 50 FCC 2d at 1085 n.47. However, we have stated that we would not be favorably inclined to grant any request premised on views rejected when the rule was adopted, as we do not intend to relitigate resolved issues. *Second Report and Order*, 50 FCC Rcd at 1085. *See Fox*, 8 FCC Rcd at 5348; *Second Report and Order Recon.*, 53 FCC 2d at 593-94.

6. In support of its waiver request, Shelbyville Publishing raises three main points: (1) combined ownership of WLIJ and the *Times-Gazette* will result in the "unique public benefit" of improving WLIJ's local news and public affairs programming; (2) Congress has authorized the Commission to change its policies concerning newspaper and broadcast station cross-ownership; and (3) the combined ownership of WLIJ and the *Times-Gazette* will not result in any significant decrease in media diversity. Shelbyville Publishing claims that WLIJ, a small, stand-alone AM station with limited resources,[2] cannot afford to provide local news coverage on its own, but that under co-ownership with the *Times-Gazette*, WLIJ will be able to provide in-depth coverage of local news and public affairs. Shelbyville Publishing submits data showing that a team of local news reporters and editors comparable to that of the *Times-Gazette* would cost in excess of $200,000 per year.[3] Shelbyville Publishing also submits data showing that 1994 revenues for WLIJ totaled slightly more than $165,000, which it claims would make it impossible for the station to provide in-depth local news coverage in the absence of a cross-ownership waiver. In fact, Shelbyville Publishing argues that given its limited budget, it would not be able to afford a news staff costing one-half that of the *Times-Gazette* (*i.e.*, $100,000).

7. Shelbyville Publishing also argues that Congress has empowered the Commission to establish a more liberal policy with respect to the grant of waiver requests in connection with the daily newspaper/radio broadcast cross-ownership rule. In recent appropriations measures, including that covering Fiscal Year 1995, (Pub. L. No. 103-317, 108 STAT. 1724, 1738 (1994)), Congress has prohibited the Commission from using funds to repeal, to retroactively apply changes in, or to begin or continue a reexamination of the daily newspaper cross-ownership rule, *except* to amend policies with respect to waivers concerning cross-ownership of a daily newspaper and an AM or FM broadcast station. In introducing the exception for radio stations in Fiscal Year 1994 legislation, (Pub. L. No. 103-121, 107 STAT. 1153, 1167 (1993)), Congress stated that in light of the Commission's finding that circumstances in the radio market had changed significantly, the Commission would be permitted to establish a more liberal policy concerning waivers allowing cross-ownership of newspaper and radio stations in the top 25 markets where at least 30 individual broadcast voices remain after the transfer is completed. H.R. Conf. Rep. No. 293, 103d Cong., 1st Sess. 40 (1993). Congress stated that the Commission retains the discretion to examine requests for *other* waivers of the radio-newspaper cross-ownership rule on a case-by-case basis upon a showing that such a waiver would have "unique public benefits." *Id.*

8. Finally, Shelbyville Publishing claims that media diversity will not be adversely affected in Shelbyville (and surrounding Bedford County), which is located approximately 50 miles southeast of Nashville, is in the Nashville area of dominant influence (ADI), and receives a wide variety of media from diverse sources.

9. In its petition to deny, Cromwell notes that its AM station, WHAL, which is also licensed to Shelbyville, provides local news and public affairs coverage without the need for co-ownership with a local newspaper. Although WHAL is owned in common with WYCQ, an FM station licensed to Shelbyville, Cromwell points out that AM-FM combinations are permitted under the Commission's rules, whereas broadcast-newspaper combinations are prohibited. Cromwell asserts that if the Commission were to grant Shelbyville Publishing's request, it would "open the floodgates" for every newspaper in the country to acquire a radio station. Cromwell argues that the Congressional authority cited by Shelbyville Publishing does not apply to smaller markets such as the one at issue.[4] Cromwell also submits that grant of the instant waiver would substantially diminish diversity and competition in Shelbyville, which, at present, has only one newspaper and three radio stations, two of which are co-owned.

DISCUSSION

10. The Commission's long-standing prohibition against cross-ownership of newspapers and broadcast facilities is designed to maximize the diversity of ownership and competition among media outlets in individual communities.[5]

[2] WLIJ is authorized to operate at 1580 kHz at a power of 1.0 kW daytime and 12 watts nighttime.

[3] Shelbyville Publishing's estimate is based on the 1995 salaries of nine *Times-Gazette* editors and reporters who are primarily responsible for gathering and reporting local news. Shelbyville Publishing has not attempted to show that combined operation of the *Times-Gazette* with WLIJ would result in any financial benefit to the newspaper. Shelbyville Publishing also does not provide an estimate of any operating efficiencies (such as administrative, sales, etc.) to be gained by WLIJ from combined ownership other than those related to the news operation. Shelbyville Publishing simply maintains that in order to "duplicate the *Times-Gazette* 's coverage," without common ownership, WLIJ needs to employ a similar number of journalists at similar salary levels.

[4] Although Bedford County is in the Nashville ADI, it is not located in the Arbitron-designated Nashville radio metro market. (Nashville is the 45th largest radio market in the country, according to Arbitron Ratings Company, and the 33d largest ADI.)

[5] *Scripps-Howard Broadcasting Co.*, 8 FCC Rcd 8012, 8013 (1993). The Commission's statutory directive to find that the grant of a broadcast license serves the public interest, convenience, and necessity, 47 U.S.C. Section 309(a), encompasses many factors, including "the widest possible dissemination of information from diverse and antagonistic sources." *Second Report and Order*, 50 FCC 2d at 1048 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)). The Supreme Court upheld the Commission's diversity rationale on appeal, stating that the Commission was "entitled to rely on its judgment, based on

We have allowed for waivers of this rule upon a showing that strict enforcement of the rule would disserve these purposes. *See Fox*, 8 FCC Rcd at 5348; *Second Report and Order*, 50 FCC 2d at 1085. In analyzing the impact of a waiver on competition and diversity, it is necessary to first determine the relevant market.

11. Shelbyville Publishing contends that such analysis should include weighing the benefits of improved service in local terms against any resulting decrease in diversity in terms of the Nashville ADI, which it claims is served by 17 television stations, 68 AM and FM radio stations, eight daily newspapers, 33 weekly newspapers, and cable systems with 53.8% penetration. In the context of this request for waiver of the newspaper/radio cross-ownership rule, the relevant market for analyzing the effects on diversity and competition of the proposed waiver is not the Nashville ADI, which relates to television stations, but rather the area in which the predicted or measured 2 mV/m contour of the AM station encompasses the entire community in which the newspaper is published. *See* 47 C.F.R. Section 73.3555(d)(1); *see also Second Report and Order*, 50 FCC 2d at 1081 (assigning limited weight to publications and broadcast media originating outside a community for purposes of analyzing diversity because such sources often deal exclusively with regional or national issues and ignore issues important to the receiving community). This area of "overlap" between radio broadcast signal and newspaper circulation occurs, in this case, in Shelbyville and surrounding Bedford County, which is not in the Nashville radio metro market. Shelbyville, with a population of 14,049, is also outside the Nashville Metropolitan Statistical Area (MSA).[6] Shelbyville is the county seat of Bedford County, which has an estimated population of 32,400, living in 12,500 households.[7] With a daily circulation of 8,504 throughout Bedford County, the *Times-Gazette* can reasonably be expected to serve approximately two-thirds of the households in Bedford County.

12. While the influence of some Nashville media outlets is certainly one factor to be considered, it is obvious that many of these "voices" do not compete against WLIJ or the *Times-Gazette* for advertisers or audience/circulation. As noted, Shelbyville and Bedford County are not within the Nashville radio metro market. It is also clear that many county newspapers and many broadcast stations licensed to distant communities in the Nashville ADI, such as Cookeville, Hendersonville, and Hopkinsville, Kentucky, do not contribute to coverage of issues of local concern in Shelbyville and Bedford County, issues that are at the heart of the Commission's concern with diversity.[8]

13. Shelbyville is the community of license of three radio stations, two of which are owned by Cromwell, and according to Shelbyville Publishing, target listeners who live north of Shelbyville, closer to Nashville. Shelbyville Publishing's waiver request relies upon the Nashville ADI as the relevant market and does not indicate which newspapers, radio stations and other media sources actually serve the market receiving service from WLIJ and the newspaper. The owner of the only newspaper published in Shelbyville requests a waiver of the Commission's rules to allow it to purchase the third radio station licensed to Shelbyville, which is independently owned at present. Thus, the impact in Shelbyville will be to decrease competition and diversity by reducing the number of independent media owners competing for advertising and audience/readers, and the number of independent voices, from three to two. Contrary to the applicant's assertion, we do not find such a reduction to be "*de minimis*" in nature. In the absence of any showing that this decrease will not significantly affect the community of Shelbyville in terms of competition and diversity, we find that Shelbyville Publishing has failed to justify the requested waiver.

14. Shelbyville Publishing asserts that the unique public benefit of improved local news coverage on WLIJ outweighs any decrease in diversity as a consequence of the combined ownership of WLIJ and the *Times-Gazette*. However, we have previously held that we will not relitigate in waiver cases issues that were settled by the *Second Report and Order*. All of the arguments raised by Shelbyville Publishing concerning improved news coverage, expertise, and operating efficiencies were considered and rejected in the rulemaking that led to passage of the present rule.[9] Shelbyville Publishing has not met its burden of showing that unique public benefits warrant a waiver of the daily newspaper/radio cross-ownership rule. *See WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

15. The Commission has granted a permanent waiver of the broadcast/daily newspaper cross-ownership rule only twice in the past twenty years, each involving major market television stations -- Chicago and New York City. The exigencies of those particular cases (*i.e.*, a struggling UHF station in Chicago; a bankrupt newspaper in New York) are not present in this case. No evidence has been presented that either WLIJ or the *Times-Gazette* is suffering financially. Likewise, there is no former relationship and no financial tie between the property to be acquired and the buyer, as there was in *Fox* and in *Field*. Furthermore, the asserted public benefit is one that was considered before and rejected when we adopted the present rule. The fact that Congress has given us the flexibility to change our policy does not suggest that we should grant waivers in cases where, as here, an applicant has not demonstrated that competition and diversity would be preserved or enhanced as a result.

16. In conclusion, we find that the asserted public benefit of improved local news coverage on WLIJ does not outweigh the cost to diversity of removing one of three independent voices in the community of Shelbyville, especially where there is no question concerning the financial viability of any of the media properties.

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experience, that it is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run.'" *Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 797 (1978) (quoting *Second Report and Order*, 50 FCC 2d at 1079-80).

[6] Rand McNally 1995 Commercial Atlas and Marketing Guide (1/1/94 estimated population).

[7] *Id.*

[8] *See Second Report and Order*, 50 FCC 2d at 1081.

[9] *See id.* at 1064-65. We acknowledged that co-ownership of newspapers and broadcast stations had a positive effect on the early growth of FM and TV service. *See id.* at 1064. However, with the maturation of these services, we found that the cost to diversity of allowing co-ownership was no longer justifiable. *Id.* at 1075.

17. Accordingly, IT IS ORDERED, That the Petition to Deny filed by the Cromwell Group IS GRANTED, That Shelbyville Publishing Co., Inc.'s request for a permanent waiver of the daily newspaper cross-ownership rule IS DENIED, and That the application to assign the license of WLIJ(AM), Shelbyville, Tennessee from Hopkins Hall Broadcasting, Inc. to Shelbyville Publishing Co., Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Separate Statement of Commissioner James H. Quello

RE: Assignment of License (Shelbyville, Tennessee)

Twenty years ago, the Commission addressed the need for diversity in broadcasting by ruling that no entity could own both a daily newspaper and a broadcast station in the same market. At a time when competition from other media was a futuristic vision, this rule served a useful purpose. As I have noted before, today's broadcasters confront a reality featuring increased cable penetration, emerging MMDS systems, and nationwide DBS. Soon to come are satellite DARS and video dialtone.

I believe that this prohibition should be reexamined as part of the overall reevaluation of our multiple ownership rules. We must ensure that broadcasters can continue to compete in today's increasingly competitive atmosphere. Allowing a newspaper to devote its reporting resources to the enhancement of a station's broadcast news programming could be an economical way of expanding local programming. At the same time, we must be cognizant of the need to enhance diversity, particularly in small markets with fewer media voices. In any event, expansion of our waiver policy is not the proper mechanism for changing this rule -- particularly a rule that can only be changed through Congressional action.

I therefore concur in this Memorandum Opinion and Order to deny Shelbyville Publishing's request for waiver and the application to assign WLIJ.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 5, 1995

COMMENT SOUGHT ON PETITION FOR WAIVER OF THE DEFINITION OF "STUDY AREA" CONTAINED IN THE APPENDIX-GLOSSARY OF PART 36 OF THE COMMISSION'S RULES AAD 95-126

Comment Date: September 29, 1995
Reply Date: October 13, 1995

On August 23, 1995, Pond Branch Telephone Company ("Pond Branch") and Ridge Telephone Company ("Ridge Telephone") filed a joint petition for waiver of the definition of "study area" as set forth in the Appendix-Glossary of Part 36 of the Commission's rules. That definition constitutes a rule freezing all study area boundaries. The requested waiver would allow Pond Branch and Ridge Telephone to alter the boundaries of their South Carolina study areas when merging the Ridge Telephone study area into the Pond Branch study area. The petitioners state that the South Carolina Public Service Commission has approved the merger.

Interested parties may file comments on the joint petition on or before **September 29, 1995**, and reply comments on or before **October 13, 1995**, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Comments and reply comments should reference AAD 95-126. Four (4) copies should also be sent to Adrian Wright, Cost Analysis Branch, Common Carrier Bureau, Room 812, 2000 L Street, N.W., Washington, D.C. 20554, and one (1) copy should be sent to the Commission's contractor for public service record duplication: International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition may be obtained from the Accounting and Audits Division's public reference room, Room 812, 2000 L Street, N.W., Washington, D.C. Copies are also available from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's ex parte rules. See generally, 47 C.F.R. §§ 1.1200-1.1206. If the waiver petition is opposed, however this proceeding becomes restricted under the Commission's ex parte rules. See generally, 47 C.F.R. §§ 1.1208-1.1216. For further information contact Adrian Wright at (202) 418-0830.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Karl H. Stoll
(Transferor)

and File No. BTCCT-920804KE

Frederick J. McCune
(Transferee)

For consent to transfer control of
station WYDO(TV), Greenville, NC

MEMORANDUM OPINION AND ORDER

Adopted: August 21, 1995; Released: September 5, 1995

By the Commission:

1. The Commission has before it for consideration an application for review filed by WITN-TV, Inc. (WITN), licensee of station WITN-TV, Washington, North Carolina, seeking reversal of the April 21, 1993 action of the Chief, Video Services Division, denying WITN's petition for reconsideration[1] and affirming the staff's September 21, 1992 grant of the above-captioned application of Karl H. Stoll to transfer control of KS Family Television, Inc. (KS Family), licensee of station WYDO(TV), Greenville, North Carolina, to Frederick J. McCune (McCune). WITN also filed a request for an order to show cause why the construction permit for WYDO(TV) should not be revoked.

2. In its petition for reconsideration, WITN asserted that grant of the application had created a violation of the duopoly rule, Section 73.3555(b) of the Commission's Rules. Specifically, WITN alleged that a prohibited Grade B overlap existed between station WYDO(TV) and station WFXI(TV), Morehead City, North Carolina. According to WITN, McCune controlled both stations by virtue of his relationship with Frederick K. McCune (McCune Senior), his father, who had a 15.74% interest in Local Televisions Associates, Inc. (LTA), licensee of WFXI(TV). In support of its assertion, WITN noted that McCune had controlled WFXI(TV) in 1991 when he filed an application to acquire the construction permit for an unbuilt station in Greenville, which he intended to operate as a satellite of WFXI(TV). The petitioner further claimed that after McCune's application was dismissed,[2] he transferred his interests in WFXI(TV) to his father, but, unbeknownst to the Commission, did not cede actual control.[3] Moreover, WITN argued that after consummation of the WYDO(TV) transaction, WFXI(TV) and WYDO(TV) had at times broadcast identical programming and dual station identifications, allegedly further indicating their common control.[4] Finally, WITN argued that McCune's failure to disclose his relationship with WFXI(TV) raises questions concerning his candor.

3. In denying the petition, the staff found that WITN had not submitted facts demonstrating common control of the two stations. The staff noted that petitioner had provided no information suggesting that McCune and McCune Senior did not operate or had not previously operated at arm's length, or that one exercised an undue influence over the other. Thus, the staff concluded that there was no reason to attribute McCune Senior's interests to McCune. In addition, the staff reminded KS Family about its duty to comply with all Commission rules and policies, including the station identification policy.

4. In its application for review, WITN claims that McCune had the burden of demonstrating the independent operation and control of WFXI(TV) and WYDO(TV), because he, his father, and other family members, have had a previous history of business dealings with respect to the acquisition and sale of interests in various broadcasting properties. Further, WITN submits information indicating that, since McCune acquired WYDO(TV), the two stations have at times again broadcast dual station identifications, and they have broadcast substantially identical programming. Moreover, WITN avers, the stations jointly sell advertising time, jointly market and promote themselves, and share an office. According to the petitioner, these are indicia of common control. Finally, in the application for review, WITN argues that McCune lacked candor and violated Section 1.65 of the Commission's Rules[5] by not informing the Commission before the grant was final that WYDO(TV) had executed a time brokerage agreement with WFXI(TV). Specifically, McCune informed the Commission in its opposition to the petition for reconsideration that he was contemplating entering into a time brokerage agreement with WFXI(TV), adding that the terms had not yet been finalized. Petitioner claims that this statement was a material misrepresentation, because only 16 days later WYDO(TV) began broadcasting the programming of WFXI(TV). According to WITN, the unlikelihood of finalizing such an agreement within this 16-day period suggests that McCune had already consented to the agreement.

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[1] On September 22, 1992, before the effective date of the staff grant of the WYDO(TV) transfer of control application, WITN filed an informal objection against that application. On September 29, however, WITN filed a petition for reconsideration which incorporated the matters raised in the objection. Those matters were fully considered and disposed of in the staff's action on the petition for reconsideration.

[2] Because it denied the permittee's application for an extension of time within which to construct, the Commission did not consider the merits of the accompanying assignment application, which included a satellite proposal. *Community Service Telecasters, Inc.*, 6 FCC Rcd 6026 (1991).

[3] WITN alleged that McCune Senior had no prior broadcast experience.

[4] Dual station identifications are generally prohibited by Section 73.1201(b) of the Commission's Rules, which requires a station to broadcast, at the beginning and ending of each time of operation as well as hourly, its call letters and its community or communities of license. 47 C.F.R. §§73.1201(a)-(b).

[5] Section 1.65 of the Commission's Rules requires an applicant to inform the Commission within 30 days of any significant changes as to any matter that may be of decisional significance in the consideration of its application.

5. In response, KS Family argues that its time brokerage agreement with WFXI(TV) is lawful, and that, rather than misrepresent its intentions, it duly informed the Commission that it was negotiating the agreement. Under the agreement, according to KS Family, WYDO(TV) retains its obligation to ensure that its programming responds to community needs; the ability to reject WFXI(TV) programming; the right to substitute other programming; and the full responsibility for all the direct and indirect costs of operating the station. The licensee further states that the arrangements between WYDO(TV) and WFXI(TV) are typical of stations involved in a time brokerage agreement. For example, KS Family notes that one of the primary purposes of such an agreement is to enhance the coverage area of the brokering station's programming. As a result, the brokering station will often include the other station's coverage area when attempting to attract advertisers. In addition, KS Family contends that the joint promotional announcements with WFXI(TV), about which WITN now complains, are permissible, and that WYDO(TV) visually airs the required station identification upon the hour, and at the beginning and end of the broadcast day. Lastly, KS Family denies that it lacked candor, or violated Section 1.65, arguing that it has no duty to report the execution of a time brokerage agreement to the Commission, and that the execution of the agreement a few days after mentioning its negotiations with LTA does not indicate that it misrepresented to the Commission the state of these negotiations, since it is possible for two parties to reach such an agreement in a few days.

6. We have reviewed the actions of the Chief, Video Services Division, and we conclude that the matters were fairly considered and properly decided under applicable precedent. The allegations *of fact* made by petitioner to demonstrate common control of the stations, even if accepted as true, *see Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985), do not establish a *prima facie* case that WYDO(TV) and WFXI(TV) were under common control in violation of our duopoly rule,[6] or that KS Family lacked candor in its disclosures to the Commission. *See Astroline Communications Co. Ltd. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988). WITN's allegations concerning common control of the two stations raise several distinct issues. First, petitioner appears to contend that, by virtue of the nature of the relationship between McCune and McCune Senior, McCune Senior's former interest in WFXI(TV) should be attributed to his son. Under the Commission's family attribution cases, the Commission begins with the assumption that each adult family member's interests are independent from, and not attributable to, other family members absent evidence to the contrary. *Cannon's Point Broadcasting Co.*, 93 F.C.C. 2d 643, 654-55 (Rev. Bd. 1983), *recon. denied*, 94 F.C.C. 2d 72, *review denied*, FCC 84-161 (April 13, 1984); *Clarification of Commission Policies Regarding Spousal Attribution*, 7 FCC Rcd 1920, 1922-23 (1992). These cases then identify factors which we consider relevant in evaluating whether one family member's interest should be attributed to another, including: (1) representations that the media interests of close family members will be independent and will not be subject to common influence or control; (2) co-mingling of ownership or other interests in media businesses; (3) participation of family members in the financial affairs, programming, and personnel decisions of each other's media interests; (4) prior broadcast experience of the individual seeking to establish independent interests; (5) financial independence; (6) sharing of personnel, equipment, contractors, or information regarding programming; (7) involvement by family members in the acquisition or application process.

7. Petitioner has presented neither persuasive nor substantial information bearing on the factors noted above. There is substantial evidence in the record supporting KS Family's contention that there is no interdependence between McCune and McCune Senior that would warrant attributing the interest of one to the other. Specifically, McCune Senior asserted in an affidavit that he acquired his interest in WFXI(TV) in an "arms length transaction" and that he "will not have any involvement, financial or otherwise, in the acquisition or operation by [his] son or any other person of WYDO-TV." Furthermore, KS Family notes that the McCunes are financially independent of one another. Indeed, McCune has personally constructed, operated, bought and sold AM, FM and television stations in eastern North Carolina since 1982, and has interests in other businesses, as well. His father has no involvement in any of these businesses, and in fact, father and son have lived nearly 200 miles apart from each other for the past 18 years. Petitioner provides no information to suggest any ongoing business relationship between the father and son in media enterprises or any other business. Weighing the relevant factors, we find no basis in the record to attribute McCune Senior's interest in LTA and WFXI(TV) to McCune and conclude that no violation of the duopoly rule is presented by McCune's acquisition of WYDO(TV).

8. Second, while the petitioner contends that the time brokerage arrangement, between WFXI(TV) and WYDO(TV) suggests continuing control by McCune over WFXI(TV), it is not clear how this relates to its assertion that McCune controls or influences WFXI(TV) through his father's minority interest in LTA. Petitioner also appears to contend that McCune, irrespective of his father's interest in LTA, retained control of LTA even though he divested himself of his 49% stock interest in and no longer holds any position with the company. WITN bases this contention, in large part, on the time brokerage agreement between WFXI(TV) and WYDO(TV), and the alleged dual identifications used by stations. Yet, there is nothing in the record to support the inference that the agreement between these stations is anything more than a legitimate brokerage agreement which is permissible under the Commission's rules. McCune did not own any stock, or have any other attributable interest in WFXI(TV), and McCune Senior held only a minority interest in WFXI(TV) and did not serve as an officer or director of LTA. Indeed, McCune Senior is a practicing physician in Virginia Beach, Virginia. Additionally, the relationships between the stations that WITN claims indicate common control are simply typical arrangements, acceptable under Commission rules and policies, that facilitate the performance of a time brokerage agreement. Finally, WITN's reliance on *Arnold L. Chase*, 5 FCC Rcd 1642 (1990), to support its claim, is misplaced. In *Chase*, the petitioner attempted to demonstrate *de facto* acquisition of control by a father of a

[6] In addition to barring common control of two television stations with overlapping Grade B contours, the duopoly rule bars common ownership of attributable interests in two such stations.

licensee corporation ostensibly controlled by his son, by noting the continuing relationship between the family businesses which included, *inter alia*, financial assistance given by the father to the son's business, and ownership by the son of a stock interest in the family enterprises that controlled the father's corporation. *Id.* at 1643-44. In this case, unlike in *Chase*, petitioner provided no information suggesting that McCune and McCune Senior worked together in a broadcast or broadcast-related business during the pendency or after grant of the transfer application. Consequently, WITN has failed to establish a *prima facie* case that McCune controlled WFXI(TV).[7]

9. In addition, we reject WITN's assertion that KS Family's failure to disclose that WYDO(TV) had begun rebroadcasting WFXI(TV)'s programming constituted a lack of candor and violated Section 1.65 of the Commission's Rules. The mere proximity between the October 27, 1992 opposition in which McCune noted that he was engaged in discussions concerning a programming agreement with WFXI(TV), the execution of the agreement on November 3, and the commencement of operations under the agreement on November 12, does not indicate that McCune attempted to mislead the Commission concerning the WYDO-WFXI programming arrangement. Thus, the circumstances surrounding the execution of the time brokerage agreement do not demonstrate that McCune either lacked candor or violated Section 1.65.

10. These factors, as well as those expressly discussed in the staff letter, support the staff's grant of the transfer application. Having so concluded, we also find that, because WITN's request for an order to show cause rests on the unsupported assumption that the two stations are commonly controlled in contravention of our rules, it should be denied.

11. Accordingly, IT IS ORDERED that the application for review filed by WITN-TV, Inc. IS DENIED.

12. IT IS FURTHER ORDERED that the request for an order to show cause why the construction permit for station WYDO(TV), Greenville, North Carolina, should not be revoked, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[7] LTA recently assigned WFXI(TV) to Gocom Television, L.P. (File No. BALCT-940915KY), thereby divesting itself of the station. WITN filed a petition to deny this transaction. On March 31, 1995, the staff granted the assignment application and denied the WITN petition. The parties consummated the transaction on May 2, 1995, and on May 10, WITN filed an application for review of the staff decision.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RADIO CHATTANOOGA, INC. File Nos.: BR-890322UQ BRH-890322UG

For Renewal of Licenses of
Stations WGOW(AM)/WSKZ(FM)
Chattanooga, Tennessee

MEMORANDUM OPINION AND ORDER

Adopted: July 31, 1995; Released: September 5, 1995

By the Commission:

I. INTRODUCTION

1. The Commission has before it: (i) a Petition for Reconsideration timely filed by the Tennessee State Conference of Branches of the NAACP and its respective branches ("NAACP") of the Commission's decision in *Radio Chattanooga, Inc.*, 7 FCC Rcd 2929 (1992) (*WGOW(AM)/WSKZ(FM)*), where we granted the renewal applications for Stations WGOW(AM)/WSKZ(FM), Chattanooga, Tennessee, subject to reporting conditions and a $11,000 forfeiture: (ii) an opposition to the petition for reconsideration filed by Radio Chattanooga, Inc., the licensee of the stations ("RCI");[1] and (iii) the NAACP's reply to the opposition. The NAACP requests that we reconsider our decision in *WGOW(AM)/WSKZ(FM)* and designate the stations' renewal applications for hearing. For the reasons which follow, we deny the NAACP's petition.

II. BACKGROUND

2. In *WGOW(AM)/WSKZ(FM)*, we found that the licensee's record indicated insufficient efforts to implement an effective EEO program. Specifically, the licensee relied mostly on applications already on file rather than regularly contacting recruitment sources when job vacancies became available. In addition, the licensee failed to change the stations' referral sources or take other action to improve the flow of minority applicants, and attracted only four Black applicants during its review period. Also, we noted that the licensee failed to maintain adequate records for meaningful self-assessment. Accordingly, the Commission granted the renewal applications subject to reporting conditions and issued a Notice of Apparent Liability for $11,000.

3. In its petition for reconsideration, the NAACP argues that the license renewal applications should have been designated for hearing. The NAACP maintains that the Commission did not consider that the licensee had received an inquiry letter in 1982. In failing to do so, the NAACP argues, the Commission failed to treat the licensee as a "recidivist". Moreover, citing to the Commission's decision in *Rust Comm. Group, Inc.*, 53 FCC 2d 355 (1975), the NAACP claims that the Commission did not consider whether the licensee discriminated against minorities by determining that only certain types of jobs were suitable for them. Specifically, the NAACP notes that the licensee used minority recruitment sources for sales positions and only general sources for its announcer and technical positions. In addition, the NAACP argues that the Commission failed to consider that the licensee did not have any minorities on its part-time staff. Next, citing *CRB of Florida, Inc.*, 6 FCC Rcd 2303 (1991), the NAACP maintains that the Commission failed to consider whether the licensee's "destruction" of EEO records, after receiving an inquiry letter in 1982, raises issues of misrepresentation and abuse of process which should have been resolved in a hearing. Finally, the NAACP asserts that, even absent any evidence of discrimination, the licensee's noncompliance with our EEO Rule warranted designation for hearing.

4. In responding to the licensee's argument that the 1982 inquiry letter only requested additional information, the NAACP insists that the fact that the stations received an inquiry letter in 1982 should have placed the licensee on notice that it was required to maintain records of its EEO efforts. Therefore, the NAACP contends, the licensee's failure to maintain its EEO records constitutes abuse of process. The NAACP also criticizes the licensee's explanation regarding contact with minority recruitment sources for non-sales jobs, contending that it is incredible that the licensee has no documentation reflecting use of minority sources for non-sales vacancies, although it maintains recruitment data showing use of non-minority sources.

III. DISCUSSION

5. Reconsideration is appropriate where the petitioner shows either a material error or omission or raises additional facts not known or not existing until after the petitioners' last opportunity to present such matters. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom., Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106(c). Applying this standard, we conclude that reconsideration is not warranted. The NAACP has not provided any additional facts not known or not existing until after its last opportunity to present such facts and we find its argument that the decision in WGOW(AM)/WSKZ(FM) constituted material error to be unpersuasive.

6. The NAACP's argument that we failed to consider the licensee as a "recidivist" lacks merit. Upon review of the licensee's EEO 1979-1982 performance, the Commission found no evidence of violations of its EEO Rule and granted the stations' 1982 renewal applications unconditionally. Thus, there is no basis for the claim that the licensee is a chronic or habitual violator of our EEO Rule based on its 1979-1982 record.

7. Next, we also find to be without merit the NAACP's argument that the licensee's listing of two minority sources only for sales positions indicates discrimination. The NAACP's reliance on *Rust* in this case is inappropriate. In that case, the licensee of two Rochester, New York, stations told the Commission that it would contact minority or-

[1] RCI timely paid the $11,000 forfeiture.

ganizations "when suitable openings exist" and "where feasible." Moreover, the licensee allegedly made discriminatory remarks to one minority applicant and allegedly failed to act on the application of another minority applicant. In *Rust*, the Commission found that a *prima facie* case of employment discrimination had been established, and designated the renewal applications for hearing. Here, the licensee's recruitment efforts, while inadequate, led to its receipt of applications from four Blacks for announcer positions.

8. Moreover, we reject the NAACP's criticism regarding our alleged failure to consider the licensee's lack of minority part-time employment. Although our EEO Rule requires broadcasters to provide equal employment opportunity with respect to all positions, our primary focus is on efforts for full-time vacancies when analyzing EEO programs. *See WFSQ(FM)*, 7 FCC Rcd 6045, 6046 (1992). This ruling is not inconsistent with our decision in *Century Broadcasting Corp.*, 40 RR 2d 1019 (1977). In *Century*, the Commission did not use the part-time employment of a Black employee to mitigate a licensee's lack of minority full-time employees. Rather, the Commission noted the advancement of this part-time employee to a full-time position. Moreover, the Commission noted that this advancement was not a significant mitigating factor. Therefore, the Commission did not err in this case by not focusing on the licensee's part-time employment record.

9. We also disagree that the licensee's failure to maintain adequate records of its EEO program constitutes misrepresentation and abuse of process. Misrepresentation involves false statements of fact made with an intent to deceive. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983). During the original proceeding, the licensee explained that it did not maintain complete documentation of its recruitment activity because it was unaware of the change in the Commission's record-keeping requirements. The NAACP has submitted no evidence rebutting this explanation. Nor does it question the veracity of the information submitted. *Compare Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501 (D.C. Cir. 1988). Abuse of process involves use of Commission processes to reach an end that the process was not designed to reach or which undermines the purpose of the process. *Comparative Renewal Process*, 3 FCC Rcd 5179, 5199, n.2 (1988). The NAACP has submitted no evidence that the licensee failed to maintain adequate records.[2] *WWOR-TV, Inc.*, 7 FCC Rcd 636 (1992), and *Dorothy O. Schulze and Deborah Brigham*, 6 FCC Rcd 4218 (1991), cited by the NAACP in support of its contention are inapposite. In *WWOR-TV*, we found evidence of abuse of process and lack of candor where a comparative renewal challenger changed its explanation after documentation presented in a remand hearing revealed that its original explanation for its formation to contest a renewal could not have been true. In *Schulze*, a license applicant was found to have abused our processes by advising non-parties against attending depositions. No such acts of abuse have been presented in this case.

10. Finally, we find no basis for concluding that the licensee's equal employment opportunity program warranted designation of its renewal applications for hearing. Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d)(1), requires designation for hearing only where there is a substantial and material question of fact or evidence of employment discrimination. *See Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). It is undisputed that the licensee contacted recruitment sources, received minority referrals, and considered minority applicants for full-time positions during the license term. Thus, here, there is neither a substantial and material question of fact nor evidence of discrimination, and a hearing is not compelled. *See Florida State Conference of Branches of the NAACP v. FCC*, 24 F.3d 271 (D.C. Cir 1994).

IV. CONCLUSION

11. Upon review of the NAACP's petition for reconsideration, the licensee's opposition and the NAACP's reply, we find that reconsideration is not appropriate here. The NAACP failed to show additional facts not known or not existing until after its last opportunity to present such facts. In addition, although the NAACP argued material error in *WGOW(AM)/WSKZ(FM)*, for the above reasons we do not find its arguments persuasive. Accordingly, NAACP's petition for reconsideration is denied.

V. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by NAACP IS DENIED.

13. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this *Memorandum Opinion and Order* to each party.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[2] This addresses an allegation made by the NAACP and does not reflect a change in the standard of Commission review.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C.F. Communications Corporation,
Complainant,

v.

Century Telephone of Wisconsin, Inc.,	File No. E-89-170
GTE North Incorporated,	File No. E-89-171
Wisconsin Bell, Inc.,	File No. E-89-172
Mosinee Telephone Company,	File No. E-89-179
North-West Telephone Company,	File No. E-89-180
Turtle Lake Telephone Company,	File No. E-89-181
Utelco, Inc.	File No. E-89-182

Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: August 9, 1995; Released: September 6, 1995

By the Commission:

I. INTRODUCTION

1. In a Memorandum Opinion and Order released on October 14, 1993, the Common Carrier Bureau ("Bureau") denied the complaints filed by C.F. Communications Corporation ("CFC") against the above-captioned defendants, who are local exchange carriers ("LECs").[1] CFC's complaints alleged that the defendants had improperly applied end user common line ("EUCL") charges to lines serving CFC's payphones. On November 15, 1993, CFC and the American Public Communications Council ("APCC"), an intervening party,[2] each filed an application for review of the *CFC Order*.[3] For the reasons stated below, we deny the applications.

II. BACKGROUND

2. CFC is a provider of coin-operated and coinless[4] payphones in Wisconsin. It purchases exchange access service from the defendants for these payphones. CFC's complaints[5] alleged that the defendants violated Sections 201(b) and 202(a) of the Communications Act[6] and Part 69 of the Commission's rules[7] by applying EUCL charges to CFC's payphones. CFC argued that it is a "carrier" rather than an "end user" because it resells telecommunications services through its payphones. Therefore, CFC maintained, the defendants could not lawfully assess EUCL charges on CFC's payphone lines. It also contended that the defendants unlawfully discriminated by assessing the EUCL charges on CFC's, but not their own, payphone lines. CFC sought damages in the form of the EUCL charges it had paid to the defendants, along with consequential damages and attorney fees.

3. In the *CFC Order*, the Bureau found that the defendants had properly assessed EUCL charges on CFC's payphone lines.[8] In arriving at that decision, the Bureau concluded that although CFC was a resale common carrier, it was also an "end user" under Section 69.2(m) of our rules[9] and thus subject to EUCL charges.[10] The Bureau found that because "all users of CFC's pay telephones must come to the premises where the telephones are located in order to place calls,"[11] CFC was the type of reseller that is also an end user under Section 69.2(m) of our rules. The Bureau further concluded that the payphone service provided by CFC is not "public telephone" service under Section 69.2(ee) of our rules.[12] The Bureau noted that this section defines a "public telephone" in part as "a telephone provided *by a telephone company*," which, CFC acknowl-

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[1] *C.F. Communications Corp. v. Century Tel. of Wis.*, 8 FCC Rcd 7334 (Com. Car. Bur. 1993) ("*CFC Order*").

[2] In the *CFC Order*, the Bureau granted APCC's motion for leave to intervene and accepted its *amicus* brief into the record. *Id.* at 7337.

[3] We will refer to CFC and APCC collectively as "the applicants."

[4] Although the record does not specify what CFC means by the term "coinless," it appears to mean a payphone that does not accept coin payment but instead requires calls to be billed to a credit card or on a collect or third-number basis. Such a payphone may have a credit card scanner rather than a coin slot.

[5] CFC's complaints were originally filed as a civil action in the U.S. District Court for the Western District of Wisconsin. *C.F. Communications Corp v. Century Tel. of Wis.*, Case No. 89-C-0168-C (W.D. Wis. filed Feb. 16, 1989). On April 27, 1989, the court entered an order referring the case to this Commission under the doctrine of primary jurisdiction. *See United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 63-65 (1956) (under this doctrine, issues not within the conventional experience of judges or requiring the exercise of administrative discretion by an expert federal agency are referred to that agency for resolution). CFC filed the instant complaints on May 10, 1989.

[6] 47 U.S.C. §§ 201(b), 202(a).

[7] 47 C.F.R. Part 69.

[8] 8 FCC Rcd at 7335-36.

[9] Under Section 69.2(m), an "end user" is

> any customer of an interstate or foreign telecommunications service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an "end user" when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an "end user" if all resale transmissions offered by such reseller originate on the premises of such reseller.

47 C.F.R. § 69.2(m).

[10] *See id.* § 69.5(a) ("[e]nd user charges shall be computed and assessed upon end users"); *id.* § 69.104(a) ("A charge ... shall be assessed upon end users that subscribe to local exchange telephone service, Centrex or semi-public coin telephone service to the extent that they do not pay carrier common line charges.").

[11] *CFC Order*, 8 FCC Rcd at 7336.

[12] A "[p]ublic telephone is a telephone provided by a telephone company through which an end user may originate interstate or

edges, it is not.[13] Hence, the exemption from EUCL charges for "public" telephones did not apply to CFC's payphones.[14] The Bureau rejected CFC's argument that the use of the term "telephone company" in the definition of "public telephone" is not intended to exclude other entities as providers of public telephones.[15] The Bureau also found that CFC was providing "semi-public" rather than "public" telephone service because "[e]ach of CFC's telephones is capable of both public and private use because of the way in which the LEC provides . . . regular subscriber business lines [that] are modified in certain cases to handle" such payphones.[16]

III. DISCUSSION

A. Contentions of the Parties.

4. Both CFC and APCC argue that the Bureau erred in finding that CFC is an end user whose service does not constitute public telephone service within the meaning of the Commission's rules. Reiterating arguments made in the original complaints, they contend that the location of CFC's payphones cannot be construed to be CFC's "premises" by any accepted definition of that term, because CFC neither owns nor controls the sites upon which its payphones are located. According to the applicants, CFC is therefore a carrier rather than an end user under Section 69.2(m) because its resale transmissions do not originate on its own premises. The applicants point out that, in any event, CFC is not "exclusively" a reseller because non-resold calls originate from its payphones.[17] The applicants also argue that the Bureau incorrectly designated CFC's payphones as "semi-public" instead of "public." The applicants contend that payphones of the type that CFC provides have been considered "public" throughout their regulatory history, noting that in regulatory proceedings, certain LECs have repeatedly identified such payphones as direct competitors to their own public payphones. APCC maintains that the application of EUCL charges to CFC's payphones, but not to LEC payphones, constitutes unlawful discrimination under Section 202(a) of the Communications Act.[18] The applicants further aver that CFC's payphones are not used for private purposes and thus cannot be considered semi-public.[19] In addition, CFC argues that the imposition of EUCL charges on its payphones represents double recovery of common line costs because LECs already recover these costs through the carrier common line (CCL) charges paid by interexchange carriers serving the payphones.[20]

5. In their oppositions to the applications for review, GTE and Wisconsin Bell maintain that the Bureau correctly found that CFC is an end user and, therefore, subject to EUCL charges. Specifically, these defendants assert that CFC is a end user because it acts as a reseller and because all resale transactions originate on CFC's premises.[21] These parties also note that because CFC subscribes to local exchange service, the defendants properly assessed EUCL charges in accordance with the Commission's Part 69 rules. Both of these defendants further argue that CFC's payphones cannot be considered "public" telephones.[22] Wisconsin Bell contends that CFC is not a "telephone company" under the Commission's rules and, therefore, cannot be a provider of "public" telephone service under Section 69.2(ee). GTE adds that CFC is incorrect in alleging that the disputed EUCL charges represent a double recovery of costs.[23] According to GTE, the costs recovered from the EUCL charges are not included in the CCL charges that interexchange carriers pay.

6. In their joint opposition, Century Telephone and Utelco also maintain that the Bureau correctly found that CFC is both a reseller and an end user.[24] They assert that the phrase "premises of such reseller" appearing in Section 69.2(m), the definition of "end user," corresponds to the place where the reseller's equipment is located or where its service is offered. According to Century and Utelco, this phrase cannot include an ownership requirement, because then LECs could not recover EUCL charges when a reseller does not own the land or building where the resale takes place. They further contend that CFC's payphones cannot be considered "public" telephones because under Section 69.2(ee), such phones can only be offered by telephone companies.[25] Other entities can only provide "semi-public" or "limited" payphones. In their joint "Response to the Applications for Review," North-West Telephone Company and Turtle Lake Telephone Company simply request that we uphold the Bureau's decision. In its reply, APCC reiterates arguments from its application for review.

B. Decision.

7. We have carefully examined the applications for review. The applicants have raised two principal arguments: first, that the Bureau erred in finding that CFC acted as a reseller whose resale transmissions originated entirely on its premises and was therefore an "end user" under Section 69.2(m); and, second, that the Bureau erred in finding that CFC did not offer "public telephone" service. To address the first argument, we must, in part, determine the mean-

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foreign telecommunications for which he pays with coins or by credit card, collect or third number billing procedures." 47 C.F.R. § 69.2(ee); *see also id.* § 69.2(hh) ("telephone company" is defined as "a carrier that provides telephone exchange service as defined in Section 3(r) of the Communications Act of 1934").

[13] CFC Reply Brief at 7.

[14] "Public" telephones are not among those that are subject to EUCL charges. *See id.* § 69.104(a); *see also MTS and WATS Market Structure*, 97 FCC 2d 682, 703-06 (1983) ("public" payphones exempted from EUCL charges).

[15] *CFC Order*, 8 FCC Rcd at 7336.

[16] *Id.* According to APCC, providers of such payphones may use business lines for their phones and add certain hardware and software features that perform "payphone exchange functions" associated with interstate or foreign long distance calling. APCC Application at 14-15. In addition, because payphones are "aggregator" locations under Section 64.708(b) of our rules, 47 C.F.R. § 64.708(b), the lines serving the payphones may be equipped with blocking or screening services to prevent unauthorized calling. *Id.* at 16; *see Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Order on Reconsideration, 7 FCC Rcd 4355, 4359-62 (1992).

[17] CFC Application at 5 n.2; APCC Application at 20.

[18] APCC Application at 17.

[19] *Id.* at 11.

[20] CFC Application at 13-14.

[21] GTE Opposition at 2-3; Wisconsin Bell Opposition at 5-7.

[22] GTE Opposition at 3-4; Wisconsin Bell Opposition at 7-9.

[23] GTE Opposition at 3-4.

[24] Century/Utelco Joint Opposition at 9-18.

[25] *Id.* at 19-24.

ing of the word "premises," which is not defined by our rules. To address the second argument, we must apply the term "public telephone," which is defined by our rules. In summary, we find neither argument persuasive.

8. In reviewing the Bureau's order, we must examine it in light of the Commission's decisions in the access charge rule making proceeding,[26] in which the Commission determined how the access charge system would function. Essentially, we must decide whether the Bureau's conclusions were internally consistent with this regulatory system as a whole, as court decisions require.[27] In the access charge proceeding, the Commission adopted rules to determine the manner in which local exchange carriers were to be compensated for the origination of interstate and foreign telecommunications services. These rules defined a number of access rate elements for which either end users or interexchange carriers would be assessed associated charges, and among the end user charges was one for the end user common line element.[28] Through the EUCL charge, LECs were to recover a significant part of the interstate revenue requirement associated with the nontraffic sensitive plant linking each subscriber's premises to an end office.[29] In refining the details of the EUCL charge, the Commission noted that the "concept that users of the local telephone network should be responsible for the costs they actually cause is sound from a public policy perspective and rings of fundamental fairness."[30] This concept of "cost causation" as a basis for determining who should bear certain costs was reiterated throughout the access charge proceeding as an important principle.[31]

9. At the time of the access charge proceeding, LECs provided pay telephones exclusively, and customers were not authorized to interconnect payphones to the public network.[32] The Commission established a pay telephone element to which it apportioned a LEC's investment in payphones, payphone lines, and associated appurtenances.[33] Initially, this revenue requirement was to be recovered solely through end user usage charges only on coin calls, which are referred to as "sent paid" calls. Because the majority of all calls placed from payphones were billed on a collect, credit card, or third party basis, however, such a rate structure would have recovered this revenue requirement from only a minority of the persons using payphones, a violation of the "cost causation" principle.[34] On reconsideration, the Commission decided that best available solution to this problem was to eliminate the separate pay telephone element and to allocate the revenue requirement for "public" payphones to the carrier common line (CCL) element.[35] The Commission treated "semi-public" payphones differently, however, requiring that the associated loop costs be recovered "in the same manner that costs associated with an ordinary business subscriber line are recovered."[36] Consistent with the "cost causation" principle, the Commission said that such fixed costs can be recovered from "an identifiable business end user," apparently referring to the specific customer on whose premises the semi-public payphone was located and who would likely have requested placement of the payphone on those premises.[37] With this background on access charges in mind, we now examine the applicants' arguments regarding the Bureau's order in this case.

10. *CFC as an "end user."* In its decision, the Bureau found that CFC is a resale carrier whose resale transmissions always originate at the premises upon which its payphones are located.[38] The Bureau then concluded that CFC is an "end user" under the definition in Section 69.2(m) of our rules and is thus subject to payment of EUCL charges.[39] The applicants now argue that because CFC does not own the premises upon which its telephones are located, it cannot be designated an "end user" under our rules. This contention requires that we interpret the definition of "end user" in Section 69.2(m), which includes "a person or entity that offers telecommunications services exclusively as a reseller . . . if all resale transmissions offered by such reseller originate *on the premises of such reseller*."[40]

11. As we have already noted, our rules do not define the key word "premises" in the definition of "end user." We must, therefore, ascertain its proper meaning so that we can determine whether the Bureau erred in its application of Section 69.2(m). The courts have repeatedly recognized the authority of agencies to interpret their own rules.[41] Under these cases, we must interpret the word "premises" in the definition of "end user" in a way that is internally consistent with the remainder of the regulation.[42]

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[26] *MTS and WATS Market Structure*, CC Docket No. 78-72: Third Report and Order, 93 FCC 2d 241 (1983) (hereinafter *Access Charge Order*), *modified on recon.*, 97 FCC 2d 682 (1983) (hereinafter *First Reconsideration Order*), *modified on further recon.*, 97 FCC 2d 834 (1984) (hereinafter *Second Reconsideration Order*), *aff'd and remanded in part sub nom. National Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985), *modified on further recon.*, 101 FCC 2d 1222 (1985) (hereinafter *Third Reconsideration Order*), *further recon.*, 102 FCC 2d 849 (1985) (hereinafter *Fourth Reconsideration Order*).

[27] *Capital Network System v. F.C.C.*, 28 F.3d 201, 206 (D.C. Cir. 1994) (when construing regulations, "ultimate criterion" is the agency's interpretation, which controls unless "plainly erroneous" or "inconsistent with the regulation") (quoting *United States v. Larionoff*, 431 U.S. 864, 872 (1977)).

[28] *First Reconsideration Order*, 97 FCC 2d at 684-85.

[29] *Id.* at 685; *Second Reconsideration Order*, 97 FCC 2d at 836 (EUCL charge provides mechanism by which LECs recover interstate subscriber loop costs through fixed monthly charges).

[30] *First Reconsideration Order*, 97 FCC 2d at 686.

[31] *E.g., id.* at 688-89; *Second Reconsideration Order*, 97 FCC 2d at 838 ("Any method of recovery that shifts some of the cost of ... a person's line to other persons imposes an inequitable burden upon the persons who pay those costs.").

[32] *See Second Reconsideration Order*, 97 FCC 2d at 880 (request for authorization to interconnect customer-owned payphones to the network deemed beyond the scope of the proceeding).

[33] *See Access Charge Order*, 93 FCC 2d at 280.

[34] *First Reconsideration Order*, 97 FCC 2d at 703-06.

[35] *Id.* at 705.

[36] *Id.* at 706.

[37] *See id.* at 704 n.40, 706.

[38] *CFC Order*, 8 FCC Rcd at 7336.

[39] 47 C.F.R. § 69.2(m); *see also id.* § 69.104(a) ("A charge ... shall be *assessed upon end users* that subscribe to local exchange telephone service, Centrex or semi-public coin telephone service to the extent that they do not pay carrier common line charges.") (emphasis added).

[40] *Id.* § 69.2(m) (emphasis added).

[41] *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

[42] *See, e.g., Capital Network System*, 28 F.3d at 206 (when construing regulations, "ultimate criterion" is the agency's in-

12. To begin our analysis of this definition, we look to prior Commission decisions and other authorities. When the Commission adopted its Part 69 access charge rules, it required that the total costs of providing exchange access for interstate and foreign services be recovered both from charges imposed on end users and from charges imposed on interstate and foreign carriers.[43] Hence, local exchange carriers recover the total interstate portion of local loop costs from the end user common line (EUCL) charges, which are at issue here, and the carrier's carrier charges. While most interexchange carriers and resellers of interexchange service pay carrier's carrier charges, the Commission has long recognized that resellers such as hotels, which provide their communications services solely at their own premises, should be treated as end users and assessed the EUCL charge.[44] Such resellers generally offer service to transient callers who do not themselves have any subscription agreement with the LEC for the line being used.[45] In such a situation, the reseller, as an "identifiable business end user,"[46] is assessed the EUCL charge and thereby stands in the place of the transient caller who is the actual "cost causer" in a sense and from whom that charge would be unrecoverable. Moreover, while the caller is a "cost causer" by using the line, the "identifiable business end user" is also a "cost causer" in that it orders the local lines so that it may provide them, as part of its business, to the actual callers. Hence, under the cost causation principle, it is equitable for a reseller whose resale transmissions originate entirely on its "premises" to bear the EUCL charge.

13. We have not, however, had frequent occasion to offer an interpretation of the word "premises" in Section 69.2(m), although we have often mentioned hotels as examples of resellers that are also end users under this section. In CC Docket No. 86-1, we clarified that "premises" under Section 69.2(m) was not limited to a single building but could be applied as well to a complex, or campus-style configuration, of buildings.[47] There, we "reject[ed] any narrow construction of the term 'premises'" in that section.[48] Courts and other authorities have taken the same approach under various circumstances, noting that the word "premises" does not have a single fixed meaning but is, rather, defined according to its context.[49]

14. We shall likewise reject any overly narrow construction here and look at the context to determine whether the Bureau correctly construed the word "premises" in applying Section 69.2(m). In arguing that its resale transmissions do not "originate *on the premises of such reseller,*"[50] the applicants contend that the latter phrase means that CFC must *own* the locations at which its payphones are placed. We do not think, however, that such an ownership requirement is intended by or can reasonably be inferred from this phrase, and the applicants cite no persuasive authority to support their interpretation.[51] Even in the case of hotels, motels, or hospitals, which the applicants concede to be examples of resellers that are end users, there need not be ownership of the "land and buildings"[52] for the entity operating such a business or institution to be both a reseller and end user. The relevant context under Section 69.2(m) is that use of the resold services originate only on the premises where the resale takes place and where, in most cases, the reseller's switch is located. In other words, just as a hotel's resold services can only be used at that hotel, regardless of who owns the land or building where the hotel is located, CFC's resold services can only be used where its payphones are located, regardless of who owns the land on or building in which the payphones are placed. In either case, the resold telecommunications services would be unaffected by the ownership of the land or building.

15. There is no question that the land on or building in which a hotel or a payphone is located could be owned by a person or entity other than the one that operates the hotel or the payphone. Even given such separate ownership of the real property, however, both the operator of the hotel and of the payphone would have some right to use the land or building that would have been granted directly or indirectly by the owner. We find it significant that the record here reveals that CFC has the legal right to use the real property in question to provide payphone service and that CFC has full responsibility for the operation and maintenance of those payphones.[53] Hence, CFC in fact exercises limited legal control over the land on or buildings in which its payphones are located in order to fulfill its obligation to provide payphone service.

16. Using this construction of the term "premises," the Bureau correctly found that CFC was a reseller whose resale transmissions originated entirely on its premises and

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terpretation, which controls unless "plainly erroneous" or "inconsistent with the regulation") (quoting *Larionoff*, 431 U.S. at 872).

[43] *See* 47 C.F.R. § 69.5.

[44] *See WATS-Related and Other Amendments of Part 69 of the Commission's Rules*, 59 RR 2d 1418, 1432-36 (1986); *First Reconsideration Order*, 97 FCC 2d at 711. When a hotel, for example, resells service, it may place a flat surcharge on calls made by its guests or may charge the guests rates that are different from those charged by the hotel's underlying interexchange carrier.

[45] In this situation, it is the reseller, not transient caller, with whom the LEC has a customer-carrier relationship and from whom the EUCL portion of the exchange access costs can be recovered.

[46] *Cf. First Reconsideration Order*, 97 FCC 2d at 706.

[47] *WATS-Related and Other Amendments of Part 69 of the Commission's Rules*, 59 RR 2d 1418, 1436 (1986).

[48] *Id.*

[49] *Cf. Gibbons v. Brandt*, 170 F.2d 385, 387 (7th Cir. 1948) ("the word premises' does not have one fixed and definite meaning. It is to be determined always by its context ...."); *O'Connor v. Great Lakes Pipe Line Co.*, 63 F.2d 523, 525-26 (8th Cir. 1933) ("There can be no definition of the word 'premises' applicable to every situation in which it may be used. It is a word of many meanings and usages."); *Black's Law Dictionary* 1180-81 (6th ed. 1990) ("Premises is an elastic and inclusive term, and it does not have one definite and fixed meaning; its meaning is to be determined by its context and is dependent on circumstances in which used, and may mean a room, shop, building, or any definite area.").

[50] 47 C.F.R. § 69.2(m) (emphasis added).

[51] The applicants cite only dictionary definitions of "premises," which do not specifically address the instant context. *See* CFC Application at 5-7; APCC Application at 20-23.

[52] *See* CFC Application at 5-6.

[53] *See* APCC Application at 10, 21; CFC Reply Brief at 9.

was, therefore, an "end user" as defined by Section 69.2(m) of our rules. Such a conclusion is completely consistent with the reasoning the Commission used when formulating the access charge system. As we emphasized above, a key concept in the way costs were allocated under that system is the principle of "cost causation." In the instant situation, the transient caller who uses CFC's payphone is the cost causer through use of the local line, but as is the case with hotel guests, the caller has no customer-carrier relationship with the LEC who provides the local loop. Because the end user portion of the local loop costs cannot be recovered from such a caller, it must be recovered from the "identifiable business end user," CFC, who acts as a surrogate for the transient caller. Further, as we have noted more generally above, CFC, as the subscriber, orders the local lines from the LEC so that those lines may be used for CFC's payphone business. In this different sense, CFC is, in fact, a cost causer.[54] To find otherwise would be to shift the end user portion of the costs of CFC's lines to other persons or entities that can in no way be considered responsible for causing such costs, a result we consider inequitable in this situation.

17. For the reasons we have just discussed, we conclude that the Bureau was correct in construing the term "premises" in Section 69.2(m) to mean, simply, the place where, in most cases, the equipment of the reseller is located and where the use of the resold telecommunications services must originate.[55] Moreover, we note that as in the hotel context, it is the payphone owner, not the transient caller, with whom the LEC has a customer-carrier relationship and from whom the LEC can recover the end user portion of its interstate access costs. Any other conclusion would be inconsistent with the purpose of our Part 69 rules,[56] which is, in part, to ensure recovery of the end user portion of subscriber line costs.

18. The applicants also contend that CFC does not act "exclusively" as a reseller and thus is not an "end user" under our definition of that term. We disagree. Section 69.2(m) of our rules states that "a person or entity *that offers telecommunications services exclusively as a reseller* shall be deemed to be an 'end user' if all resale transmissions offered by such reseller originate on the premises of such reseller."[57] While APCC acknowledges that payphone providers such as CFC "generally resell 'sent paid' calls, for which coins are collected," it notes that "0+ calls are not resold by many [such payphone] providers, and access code calls are never resold."[58] CFC does not, however, *offer* the latter telecommunications services. It merely provides the payphone equipment through which calls utilizing such services are originated. These services are instead offered by the carriers that the caller reaches by dialing either "0+" or an access code. We find that CFC did act exclusively as a reseller for the telecommunications services that it does offer.

19. *"Public" telephone status.* Because "public" telephones may not be assessed EUCL charges,[59] the applicants take exception to the Bureau's determination that CFC's payphones are not within the definition of "public telephone" in Section 69.2(ee) of our rules. Under that section, a "[p]ublic telephone is a telephone *provided by a telephone company* through which an end user may originate interstate or foreign telecommunications for which he pays with coins or by credit card, collect or third number billing procedures."[60] The Bureau concluded that CFC is not a provider of "public telephone" service because it is not a "telephone company," which, by definition, must provide local exchange service.[61]

20. The applicants maintain that when the Commission used the term "telephone company" in this definition, it did not contemplate the effect that this term would have on the regulatory status of payphones that are not provided by telephone companies. They contend that the impact of this terminology was inadvertent and should not now be given effect. While it is true that the payphone industry has changed over the past decade because of the introduction of payphones that are not owned by telephone companies, we reject the suggestion that, because of such changes, we should ignore an unambiguous definition in our rules that is directly relevant to this proceeding.[62] We conclude that the Bureau properly determined that "public telephone" service can, under the explicit definition in Section 69.2(ee), be offered only by a telephone company. Hence, CFC's payphones are not "public" telephones. Moreover, because the defendants were correctly applying our rules in

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[54] In a similar way, a business owner who requests a LEC semi-public payphone and the associated local loop to serve, in part, the needs of that business is considered the cost causer for that line and is responsible for EUCL charges. *See First Reconsideration Order*, 97 FCC 2d at 706.

[55] *Cf. WATS-Related and Other Amendments of Part 69 of the Commission's Rules*, 59 RR 2d at 1436. Because a single "premises" is not limited to one building but may be a complex of buildings, *id.*, the reseller's switch may not necessarily be in the building where use of the resold service originates. In such a complex, however, the reseller's switch would only serve the buildings comprising the complex, which is the unifying factor that makes those buildings a single "premises" for purposes of Section 69.2(m).

[56] *See Tallman*, 380 U.S. at 16-17 (an agency's interpretation of its own rule is of controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation); *Capital Network System*, 28 F.3d at 206 (same).

[57] 47 C.F.R. § 69.2(m) (emphasis added).

[58] APCC Application at 20.

[59] *See* 47 C.F.R. § 69.104(a) ("public" telephones are not among those listed as subject to EUCL charges); *see also First Reconsideration Order*, 97 FCC 2d at 703-06 ("public" payphones exempted from EUCL charges).

[60] 47 C.F.R. § 69.2(ee) (emphasis added); *see id.* § 69.2(hh) ("telephone company" is defined as "a carrier that provides telephone exchange service as defined in section 3(r) of the Communications Act of 1934"); *see also* 47 U.S.C. § 153(r) ("'Telephone exchange service' means service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge.").

[61] *CFC Order*, 8 FCC Rcd at 7336 & n.19; *see also* 47 C.F.R. § 69.2(hh) (definition of "telephone company").

[62] We note that when the Commission did authorize the interconnection of customer-owned payphones to the network, it stated explicitly that such payphones, "[l]ike other registered terminal equipment[,] ... would be attached ... to regular telephone company subscriber line services." *Registration of Coin Operated Telephones under Part 69 of the Commission's Rules and Regulations*, 57 RR 2d 133, 138 (1984). While we acknowledge that the Commission was not considering an access charge issue there, we find it notable that competitive payphone owners have, from the outset, been considered subscribers to "regular" subscriber line services and have entered business with that knowledge.

distinguishing CFC's payphones from LEC "public" payphones, the defendants did not unlawfully discriminate when they assessed EUCL charges on the former payphones but not the latter. Even if the applicants' contention were correct, we must apply our rules as they are now codified. The applicants' arguments essentially advocate a rule change, not a rule interpretation. A formal complaint proceeding is not the forum in which to change our rules. A rule change of such material effect requires the development of a full factual record on which all interested members of the public, not just the parties to a formal complaint, would have an opportunity to comment.

21. The applicants also object to the Bureau's classification of CFC's telephones as "semi-public" rather than "public." In making this determination, the Bureau pointed out that the term "semi-public" is not defined by our rules, and it therefore relied upon state regulatory practice to reach its conclusion.[63] We note that such reliance is not uncommon.[64] While we take no exception to the Bureau's explication of the term "semi-public," we recognize that it is not CFC's intent to provide private service via its payphones. The fact remains, however, that the classification of CFC's payphones as "semi-public" does not require that they be used in that way. Further, we are unpersuaded by the applicants' claim that a semi-public telephone that is not actually used for private purposes becomes, *ipso facto*, a "public telephone" under our rules. APCC states that the "Commission's access charge decision clearly provides that the actual use of the payphones determines whether the phones are public or semi-public."[65] In support, it cites a footnote in the Commission's *MTS and WATS Market Structure* proceeding.[66] That footnote, however, simply states the permissive uses for semi-public payphones. Rather than looking at how the payphone lines in question *are* used, we find it more relevant to examine how these payphone lines *can* be used. Hence, although there may be little or no private use of CFC's telephones, we agree with the Bureau's conclusion that this fact does not render such telephones immune from EUCL charges. As the Bureau found, CFC's payphones are *capable* of both public and private use because the LECs provide conventional subscriber or business lines for such phones.[67]

22. Finally, CFC argues that its treatment as an end user subject to EUCL charges results in double recovery of common line costs by the local exchange carrier.[68] CFC is incorrect. All monies collected from the fixed monthly EUCL charge are deducted from overall common line costs, the major part of the balance of which is recovered from the per-minute carrier common line charge.[69]

IV. CONCLUSION AND ORDERING CLAUSE

23. For the reasons stated above, we have determined that the Common Carrier Bureau correctly found that CFC, as a reseller whose resale transmissions originated entirely on its premises, is an end user and that CFC does not provide "public telephone" service. We therefore conclude that CFC is subject to end user common line charges on its payphone lines. Further, because the defendants distinguished between CFC's payphones and "public" telephones by applying the definition of the "public telephone" in our rules, we find that the defendants did not unlawfully discriminate under Section 202(a) of the Communications Act.

24. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), that the Applications for Review filed by CFC and APCC ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[63] *CFC Order*, 8 FCC Rcd at 7336.

[64] For example, under our rules, different EUCL charges have historically been applied to business and to residential users, even though the state regulatory authorities control these classifications. *See* 47 C.F.R. § 69.104.

[65] APCC Application at 11.

[66] *First Reconsideration Order*, 97 FCC 2d at 704 n.40 ("A pay telephone is used to provide semipublic telephone service when there is a combination of general public and specific customer need for the service, such as at a gasoline station or pizza parlor.").

[67] *CFC Order*, 8 FCC Rcd at 7336 (such lines may be modified in some cases); *cf. Registration of Coin Operated Telephones under Part 69 of the Commission's Rules and Regulations*, 57 RR 2d 133, 138 (1984).

[68] CFC Application at 14.

[69] *See Access Charge Order*, 93 FCC 2d at 283-85.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Jones Intercable, Inc. CUID No. AZ0158 (Oro Valley)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: August 14, 1995; Released: September 7, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaint in the franchise area which is the subject of this Order was completed and served on Operator on November 30, 1993 and received by the Commission on December 7, 1993. Operator filed FCC Form 393 in response on May 19, 1995.

5. Operator asserts that its monthly CPS tier price of $16.20 (plus franchise fee) is higher than the maximum permitted charge of $16.19 per month (plus franchise fee), as calculated in the filing. Thus, Operator has failed to show that its CPS rates are not unreasonable. However, upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Operator did not correctly account for its income tax expense. By placing entries in these columns, Operator confirms that it is a tax-paying entity (*i.e.*, a "C" Corporation). However, Operator incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (*i.e.*, calculate the tax as a percentage of return on investment plus tax).[11] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation.") *See also* Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.").

could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

b. Operator's Form 393, Part II, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Since Operator restructured its rates, including its equipment rates, on September 1, 1993, the current monthly equipment revenue figure it entered on Line 104 should have been close or identical to its equipment cost figure on Part III, Step G, Line 34.[12] However, Operator's entries on these two linesdiffered substantially. We therefore adjusted Line 104 to equal the amount entered on Line 34, including the adjustment for correctly grossed-up taxes.

c. Because Operator has failed to demonstrate that its price for the CPS tier was not unreasonable, we will set a price for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1 using the most accurate data available for the date as to which Operator filed.[13] On its Form 393, Operator calculated the Inflation Adjustment Factor as of the end of November 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor of 1.032 through November 1993, the base date Operator used in justifying its rates.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $16.00 per month (plus franchise fee) for the period from December 7, 1993 to May 14, 1994.[14]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the franchise area referenced in the caption, and all other complaints in this franchise area related to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the franchise area referenced in the caption that portion of the amount paid for cable programming service for the period from December 7, 1993[15] to May 14, 1994 which exceeded the maximum price of $16.00 per month (plus franchise fee), plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the franchise area referenced in the caption, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price of $16.00 (plus franchise fee).[16]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[12] *See* Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[13] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[14] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[16] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Jones Intercable, Inc. CUID No. SC0424 (Trenton)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: August 30, 1995; Released: September 7, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Jones Intercable, Inc. CUID No. WI0070
(City of Lake Geneva)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: August 30, 1995; Released: September 7, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS pricesupon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE — CSR-4308-P

v.

EMI COMMUNICATIONS CORPORATION

Program Access Complaint

ORDER

Adopted: August 29, 1995; Released: September 7, 1995

By the Chief, Cable Services Bureau:

1. On September 9, 1994, National Rural Telecommunications Cooperative, Inc. ("NRTC") filed a Complaint against EMI Communications Corporation ("EMI") alleging that EMI has discriminated against NRTC in the sale of satellite broadcast stations WWOR-TV (New York) and WSBK-TV (Boston) in violation of Section 628 of the Communications Act of 1934, as amended, 47 U.S.C. § 548, and 47 C.F.R. §§ 76.1002(b). EMI filed an Answer on October 25, 1994, and NRTC filed a Reply on December 5, 1994.

2. On August 11, 1995, the parties through their attorneys filed a request for dismissal fashioned as a Joint Stipulation of Dismissal ("Joint Stipulation"). In their Joint Stipulation, the parties state that they stipulate that all claims and/or counterclaims that have been or could have been asserted in this proceeding be dismissed with prejudice.

3. The Commission encourages resolution of program access disputes through negotiations between the parties in an effort to avoid time-consuming, complex adjudication. Such a policy favoring private settlement and alternative dispute resolution conserves Commission resources and is thus in the public interest. *See* First Report and Order in MM Docket No. 92-265, 8 FCC Rcd 3359, 3389, 3416 (1993).

4. We thus find that it is in the public interest to terminate this proceeding pursuant to the stipulation agreed to by the parties.

5. Accordingly, IT IS ORDERED, that the Complaint of National Rural Telecommunications Cooperative, Inc. IS DISMISSED WITH PREJUDICE. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLEVISION INDUSTRIES CORPORATION
and
SCI-FI CHANNEL

CSR-4278-P

Petition for Public Interest Determination
under 47 C.F.R. § 76.1002(c)(4)
Relating to the Exclusive Distribution of
the Sci-Fi Channel

MEMORANDUM OPINION AND ORDER

Adopted: August 28, 1995; Released: September 7, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. The Commission has before it a petition filed by Cablevision Industries Corporation ("CVI"), a cable operator, and USA Networks ("USA"), a cable programming vendor, (the "Petitioners") requesting a public interest determination pursuant to Sections 76.1002(c)(4) and (5) of the Commission's rules authorizing the Petitioners to enforce their exclusive distribution agreement with the Sci-Fi Channel programming service ("Sci-Fi"). Petitioners contend that the relief requested is authorized by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[1] and is in the public interest. The petition was placed on public notice on July 29, 1994, and is unopposed.

2. Based on the record before us, and pursuant to the criteria set forth in the 1992 Cable Act, we have determined that continued enforcement of this exclusive contract is not in the public interest, and therefore, we deny the petition. Furthermore, the Commission determines that the exclusive provisions of the contract between USA and CVI may not be used to deny programming to any multichannel video programming distributor ("MVPD").

BACKGROUND

3. Section 628(c)(2)(D) of the 1992 Cable Act provides that, in areas served by a cable operator, exclusive contracts for satellite cable programming between vertically integrated programming vendors and cable operators are prohibited unless the Commission determines that such exclusivity is in the public interest.[2] In determining whether the proposed exclusivity is in the public interest, the statute directs the Commission to consider five specific factors:

> (a) the effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets;
>
> (b) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable;
>
> (c) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming;
>
> (d) the effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and
>
> (e) the duration of the exclusive contract.[3]

The petitioners seek a public interest determination on their exclusive distribution arrangements for Sci-Fi.

4. According to the petitioners, Sci-Fi was launched in September 1992.[4] Sci-Fi is a 24-hour cable programming service consisting of "entertainment programming dealing with science fiction, fantasy, horror, science fact and/or related programming, including advertisements."[5] Petitioners state that as of July 1994, Sci-Fi was being distributed to approximately 16.3 million subscribers.[6] Prior to the launch of Sci-Fi, CVI entered into a distribution agreement with Sci-Fi, which granted CVI exclusive distribution rights in its service areas only with respect to other cable operators, MMDS operators and SMATV operations located within the operating areas of CVI's cable systems. The agreement also was subject to several other limitations.[7] Petitioners seek to enforce the exclusivity in seventy-eight CVI service areas throughout the country;[8] for eight more years, until September 23, 2002 (the remaining three years of the initial term and a five year renewal). Alternatively, petitioners seek exclusivity for the remaining three years of the initial term, until September 23, 1997.[9]

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[1] Pub. L. No. 102-385, 106 Stat. 1460 at § 19 (1992).

[2] Section 628(c)(2)(D) of the Communications Act of 1934, *as amended* (hereinafter, the "Communications Act"), 47 U.S.C. § 548(c)(2)(D). Section 628(c)(2)(C) of the 1992 Cable Act contains a flat prohibition against "practices, understandings, arrangements and activities, including exclusive contracts ... between a cable operator and a [vertically integrated programming vendor]" in areas not served by a cable operator as of October 5, 1992. 47 U.S.C. § 548(c)(2)(C). We note that this *per se* prohibition against exclusivity is not implicated in this case because the petition seeks authority for exclusive distribution in served areas only.

[3] *See* Communications Act § 628(c)(4), 47 U.S.C. § 548(c)(4).

[4] Petition at 5 n.7.

[5] *Id.* at 3.

[6] *Id.* at 5 n.7.

[7] *Id.* at 1, 2 n.5, and 4.

[8] *Id.* at 4 and Exh. A.1. According to petitioners, the contract permits exclusivity in later acquired systems in addition to the seventy-eight markets listed. However, petitioners limit their request for exclusivity to those systems listed in Exhibit A.1. *Id.* at 4.

[9] *Id.* at 3.

5. The petition states that Sci-Fi is owned by USA, a general partnership between MCA, Inc. and Paramount Communications, Inc ("Paramount").[10] According to Petitioners, Paramount has now been acquired by Viacom International, Inc. ("Viacom"). One of Viacom's subsidiaries owns cable television systems.[11] Because of its ownership of Paramount, Viacom's interest in USA is "attributable" under the standards set forth in Section 76.1000(b) of the Commission rules,[12] making USA a vertically integrated programming vendor subject to the Commission's program access rules. Accordingly, USA may not provide a cable system operator the exclusive right to distribute Sci-Fi within the operator's franchise area without an affirmative determination by the Commission that such exclusive distribution meets the public interest criteria set forth in Section 628(c)(4) of the 1992Cable Act.[13] Petitioners further state that since its acquisition by Viacom, USA has received one request from a MVPD in Daleville, Alabama (a cable overbuilder in a CVI service area) for the rights to carry Sci-Fi.[14] Petitioners filed this petition in response to that request and to seek authorization to enforce the exclusivity provisions of their agreement.

SUMMARY OF PETITIONERS' ARGUMENTS

6. Petitioners argue that CVI should not lose its exclusive programming affiliation agreement based upon corporate transactions in which it was "neither a participant in nor a beneficiary of any of these corporate transactions. . ."[15] Petitioners further argue that to deny CVI's right to enforce the exclusivity is particularly unfair here because "CVI was the party that took the risks inherent in supporting the launch of a new, untested, service."[16] Moreover, petitioners argue that due to the contractual limitations on CVI's exercise of exclusivity, the development of local and national competition in the distribution markets will not be adversely affected.[17]

7. According to petitioners, CVI entered into a distribution agreement with Sci-Fi on August 1, 1991. At that time, Sci-Fi was not a vertically integrated programming vendor and had no prospects of acquiring any vertical affiliation.[18] According to petitioners, at the time of the agreement, Sci-Fi was only a programming concept, for which two Florida entrepreneurs were "struggling to secure enough carriage commitments and financial backing to launch the service."[19] Petitioners state that CVI viewed carriage of Sci-Fi as a "risky proposition" given the number of subscribers CVI was committing (75,000)[20] and the lack of programming experience on the part of Sci-Fi's management. Petitioners state that CVI mitigated this risk by negotiating for exclusive distribution in the affiliation agreement.[21] Petitioners further state that although CVI asked for total exclusivity, Sci-Fi only accepted exclusivity with respect to cable operators, SMATV and MMDS operating in a CVI service area.[22]

8. Petitioners attached portions of the exclusive contract to their petition. In sum, the contract terms grant CVI an exclusive license to distribute Sci-Fi in its service areas with respect to MMDS, SMATV and cable operators overbuilding in a CVI service area.[23] The agreement states that the exclusivity is not effective against direct broadcast satellite ("DBS") or television receive-only ("TVRO") distributors.[24] Moreover, petitioners maintain that the agreement limits CVI's exclusivity in several ways: first, exclusivity is not effective against distributors with Sci-Fi affiliation contracts existing as of August 1, 1991; second, the exclusivity applies only to cable and SMATV operators within a CVI system's operating area, and does not apply to competitors in other areas of the CVI franchise area; and third, a cable, SMATV, or MMDS operator in an area where CVI currently is not distributing Sci-Fi, and who wishes to distribute Sci-Fi, can notify USA and CVI must launch Sci-Fi within six months of such notice in order to retain its exclusivity.[25] Petitioners also claim that while the contract entitles CVI to exclusivity with respect to cable systems acquired later by CVI, petitioners only request the Commission to grant the petition with respect to a finite list of systems.[26]

9. Petitioners argue that the limited exclusivity sought will not be a competitive threat to the national multichannel video programming distribution market. Petitioners claim that they seek only to enforce the contract in a finite number of communities which represent only 2% of the total number of cable households in the United States.[27] In contrast, petitioners point to the Commission's previous grant of exclusivity to New England Cable News ("NECN") that covered the entire New England area[28] and which "creates the potential for a much larger number of 'exclusive' subscribers than is represented by this Petition for Exclusivity."[29] Petitioners further argue that viewers in those communities still may receive Sci-Fi through DBS or TVRO distribution, or from a local competitor if a CVI system is unwilling or unable to launch the service in a short time period.[30] Moreover, petitioners argue that the exclusivity agreement involves a small number (approximately 7-8%) of total Sci-Fi subscribers and cannot be viewed as a serious threat to the national distribution market.[31]

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10 *Id.* at 2-3.
11 *Id.* at 3.
12 47 C.F.R. § 76.1000(b).
13 *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, First Report and Order* in MM Docket 92-265 (*"First Report and Order"*) 8 FCC Rcd 3359, 3384 (1993). *See also* para. 3, *supra*.
14 Petition at 9 n.13.
15 *Id.* at 5
16 *Id.*
17 *Id.* at 8.
18 *Id.* at 2-3.
19 *Id.* at 1-2.
20 *Id.* at 2 n.4. Petitioners state that since its launch, CVI has made Sci-Fi available to 875,000 of its subscribers.
21 *Id.* at 2.
22 *Id.* at 2 n.5.
23 *Id.* at 4 and Exh. A.
24 *Id.*
25 *Id.* at 4.
26 *Id.* The systems are listed in Exhibit A.1 of the petition.
27 *Id.* at 7. Approximately 1,250,000 subscribers as of the date of the petition.
28 *Id.* at 7-8. *See New England Cable News, Memorandum Opinion and Order*, (*"NECN"*), 9 FCC Rcd 3231, 3238 (1994). The *NECN* decision was limited to the six New England states.
29 Petition at 7-8.
30 *Id.* at 8.
31 *Id.*

10. Petitioners further argue that CVI's competitors, both on a national and local level, will not be harmed if the Commission grants the petition. Petitioners state that since USA has become a vertically integrated programming vendor, only one MVPD, a cable overbuilder in Daleville, Alabama, has requested carriage of Sci-Fi and that no MMDS or SMATV operators in areas where exclusivity is being sought has requested carriage of Sci-Fi.[32] Moreover, petitioners state that the exclusive contract contemplates that SMATV, MMDS and other cable operators may carry Sc-Fi in areas covered by the agreement if the CVI system in that area fails to launch the service within six months of its notification of the former's desire to launch the service. Petitioners contend that "given the limited channel capacity on most systems, subscriber notification requirements, benchmark recalculations, etc.", launching a channel within six months may prove very difficult. Thus, petitioners argue where CVI has not launched Sci-Fi and faces competition," CVI cannot lightly acquire exclusivity rights in the Sci-Fi service."[33]

11. Petitioners argue that denial of the petition will harm the development of new programming services[34] because a programming service only can attract investors if it shows the ability to secure substantial carriage commitments from MSOs.[35] Petitioners further contend that a significant factor in USA's decision to acquire Sci-Fi was the carriage commitments, including those from CVI.[36] Petitioners state that without the exclusivity provisions, CVI would not have committed to launch and continued to roll-out the service at a rate far greater than other cable operators.[37] Petitioners state that if cable operators are not able to count on the contractual promises of exclusivity by a non-vertically-integrated programmer, new programming services networks will lose the ability to attract distributors.[38] Moreover, according to petitioners, cable operators like CVI, who are "unable to enforce the exclusivity provisions because of a change in ownership may themselves be unable to honor original subscriber commitments" or may need to curtail launch support and on-going marketing efforts.[39] Thus, Petitioners conclude that the elimination of a bargained-for consideration (*i.e.* exclusivity) will decrease new programmers' ability to attract capital.[40]

12. Petitioners also contend that granting their petition will have a positive effect on the availability of diverse programming in the multichannel video programming market. In contrast, petitioners state that if cable operators, who negotiate exclusivity in good faith, cannot rely on promises of exclusivity because of potential acquisitions or mergers, they will be less willing to commit valuable channel space to innovative (and therefore risky) programming services.[41] According to Petitioners, risk-averse cable operators mean reduced diversity.[42] Petitioners argue that Sci-Fi can engage in a "host of dramatic and innovative new media activities"[43] in+large part because of the commitment of operators like CVI to aggressive roll-out schedules.[44] Petitioners contend that if the Commission denies this Petition, "substantial subscriber commitments to fledgling programmers (which, in CVI's case, are granted in exchange for exclusivity) may become a thing of the past.[45]

13. Finally, petitioners argue that their request for exclusivity for a period of eight years is consistent with the term of exclusivity granted by the Commission in *NECN*.[46] Petitioners concede that "Sci-Fi is a popular niche programmer," but contend that it still remains a "developing service."[47] Petitioners further argue that CVI's commitment and aggressive roll-out schedule for Sci-Fi is based, in part, on an expectation that CVI would have exclusivity for the duration of the contract term.[48] Thus, in the alternative, petitioners request that the Commission grant the petition until September 23, 1997, the remaining term on the contract.

ANALYSIS

14. The program access provisions in the 1992 Cable Act were enacted to increase competition and diversity in the multichannel video programming distribution market.[49] When adopting the statute, Congress was concerned by its finding that the majority of cable operators enjoyed a monopoly in program distribution at the local level,[50] and concluded that the use of exclusive contracts between vertically integrated programming vendors and cable operators served to inhibit the development of competition among distributors.[51] In addition, Congress found that increased horizontal concentration of cable operators togetherp 3with extensive vertical integration has created an imbalance of power between operators and unaffiliated programming vendors, and operators and their multichannel competitors, which also impedes the overall development of competition.[52]

15. Thus, in the 1992 Cable Act, Congress absolutely prohibited exclusive contracts between vertically integrated programming vendors and cable operators in areas unserved by cable, and prohibited such exclusive contracts

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[32] *Id.* at 8-9.

[33] *Id.* at 10. The Petitioners do not indicate which systems listed in Exhibit A.1, or generally how many of its systems, have not yet launched the Sci-Fi service.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 10-11. Petitioners state that Sci-Fi is available on 70% of the CVI systems, compared to its overall availability to 27% of all cable households.

[38] *Id.* at 11.

[39] *Id.* at 11 n.17.

[40] *Id.* at 11.

[41] *Id.* at 12.

[42] *Id.*

[43] *Id.* at 12. These activities include delivering a computer on-line service to the public, publishing Sci-fi Magazine, and providing an interactive, phone-in, program guide for its viewers through which subscribers can identify specific genre programming and receive advance scheduling information.

[44] *Id.* at 13.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 14.

[48] *Id.*

[49] *See* Communications Act § 628(a), 47 U.S.C. § 548(a).

[50] 1992 Cable Act, § 2(a)(4); House Comm. on Energy and Commerce, House Rep. No. 102-268, 102d Cong., 2d Sess. (1992) at 42.

[51] 1992 Cable Act, § 2(a)(5); Senate Comm. on Commerce, Science, and Transportation, S. Rep. No. 102-92, 102d Cong., 1st Sess. (1991) at 25-26.

[52] *See First Report and Order*, 8 FCC Rcd at 3366.

within areas served by cable absent a specific public interest showing, for a period of ten years.[53] Congress, however, recognized that in areas served by cable, some exclusive contracts between vertically integrated programming vendors and cable operators may provide countervailing benefits to the programming market or to the development of competition among distributors.[54] Congress provided that where such an exclusive contract is demonstrated to be in the public interest, it should be allowed. The public interest criteria set forth in the 1992 Cable Act reflect the benefits to the programming market that exclusivity in areas that are served by cable may provide in a particular case, ultimately which can rebut the presumption inherent in the statute's program access provisions that the use of exclusivity between vertically integrated programming vendors and cable operators frustrates the development of competition.

16. Any agreement between a vertically integrated programming vendor and a cable operator that grants a cable operator the exclusive right to distribute programming within its franchise area must be approved by the Commission before it may be enforced.[55] When engaging in this type of examination, we will examine the effect of a particular exclusive contract on each of the public interest factors listed in Section 76.1002(c)(3) of our rules. We have determined that any party seeking a determination that such an agreement meets the statutory public interest standard bears the burden of demonstrating that the proposed exclusivity provides sufficient public interest benefits to outweigh the presumptively anticompetitive effect on competing distributors. The Commission has determined that it will examine petitions for exclusivity on a case-by-case basis.[56]

Effects of Exclusivity on the Development of Competition in the Distribution Market

17. The public interest factors set forth in the rules require us to consider the effect of the exclusivity provision at issue on two aspects of the development of competition to incumbent cable operators. One statutory factor requires the Commission to consider the effect on the development of competition in local and national programming distribution markets; another statutory factor requires the Commission to consider the effect on competition from MVPD technologies other than cable.[57] As we stated in *Time Warner* and *NECN*, "[i]n conjunction with this examination, we believe it is appropriate to evaluate the geographic extent of the proposed exclusivity to identify the relevant markets within which the proposal may affect the development of competing distributors."[58] We have determined that a petitioner may rebut the presumption that exclusive contracts act as a barrier to entry into the MVPD market with a showing that competitive entry is not affected, or that any effects are minimal compared to countervailing public interest benefits to the programming market.[59]

18. To evaluate the effect of the exclusivity at issue on the development of competition in the local distribution markets,[60] we must ascertain the local markets affected. Petitioners submit a list of seventy-eight systems or communities in seventeen states, in which they seek to enforce their exclusive distribution contract. Petitioners argue that the reach of the exclusivity is not as widespread as that allowed by the Commission in *NECN*. However, the geographic scope of exclusivity granted to NECN was limited to six states.[61] We find that seventy-eight communities is not an insubstantial number of markets affected. While the record does not reflect how many of those communities have existing or potential competitors, petitioners do state that in at least one community, there is a competitor of CVI desiring access to Sci-Fi.[62] Unlike the situation in *NECN*, we cannot conclude that granting the petition "will not result in denial of access to its programming by competing MVPDs in the relevant local markets."[63]

19. Where a cable operator seeks exclusivity that would deny its competitors access to popular programming, there likely is a limiting effect on the development of competition in that market.[64] Petitioners concede that Sci-Fi is a popular niche programming service with 16.3 million subscribers.[65] Thus, we find that limiting access to this popular, established service likely will have a limiting effect on the development of competition in local markets.

20. We reject petitioners claim that the contractual limitations on CVI's exclusivity serve as a safeguard that competition will not be harmed by granting the petition. Petitioners indicate that the exclusivity in some of the seventy-eight communities may be limited due to CVI's contractual obligation to launch the Sci-Fi service within six months or forfeit its exclusive distribution rights, and that only competitors operating in areas of a CVI system are affected.[66] While those provisions may reduce the universe of emerging competitors affected by the exclusivity, it is unclear, and petitioners do not indicate, how many communities or competitors may have access to the service because of these contractual limitations. We find that the petitioners have not demonstrated that the exclusive provisions of their contract will not adversely affect the development of competition in local distribution markets or that there is anything unique with respect to Sci-Fi that would render the general policy regarding exclusivity inapplicable to it.

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[53] *See* Communications Act §§ 628(c)(2)(D), (4), and (5), 47 U.S.C. §§ 548(c)(2)(D), (4), and (5).

[54] *See* Communications Act §§ 628(c)(2)(D), (4), 47 U.S.C. §§ 548(c)(2)(D), (4).

[55] *See First Report and Order*, 8 FCC Rcd at 3386. *See also NECN*, 9 FCC Rcd at 3234; *Time Warner Cable, Memorandum Opinion and Order, ("Time Warner")*, 9 FCC Rcd 3221, 3225 (1994).

[56] *See First Report and Order*, 8 FCC Rcd at 3385.

[57] Communications Act, §§ 628(c)(4)(A)-(B), 47 U.S.C. §§ 548(c)(4)(A)-(B).

[58] *NECN*, 9 FCC Rcd at 3235; *Time Warner*, 9 FCC Rcd at 3225.

[59] *Time Warner*, 9 FCC Rcd at 3226.

[60] With respect to the effect of CVI's exclusivity on the development of competition in the national distribution markets, we note that the exclusivity does not extend to distributors in the national market, *e.g.*, DBS or TVRO distributors. Thus, we will focus on the effects on competition in the local MVPD markets.

[61] *NECN*, 9 FCC Rcd at 3238.

[62] Petition at 9 n.13.

[63] *NECN*, 9 FCC Rcd at 3235.

[64] *See Time Warner*, 9 FCC Rcd at 3227.

[65] Petition at 14. More recent information indicates that Sci-Fi has continued to grow in circulation. For example, *Broadcasting and Cable* for July 10, 1995 (p. 17) reports a Sci-Fi circulation of 23,000,000 subscribers.

[66] *Id.* at 10.

21. With respect to the effect of exclusivity on competition from non-cable MVPDs, petitioners rely on the fact that the exclusivity they are seeking does not extend to TVRO and DBS distributors. Petitioners further argue that to date no MMDS or SMATV operator has complained. As we stated in *Time Warner*, "the statutory public interest test requires us to consider the effect of exclusivity on *all* alternate technology competitors, not just DBS."[67] Thus, allowing distribution to DBS or TVRO, while seeking to enforce exclusivity against SMATV and MMDS operators may reduce the effect on non-cable competitors, it does not eliminate such a limiting effect altogether. Moreover, the fact that no MMDS or SMATV operator has complained is not dispositive of whether there is an effect on the development of competition.

22. We determine that continued enforcement of the proposed exclusivity will deny a popular programming service to actual or potential competitors in seventy-eight communities nationwide. Accordingly, we conclude that the effects of the exclusivity at issue both on (1) the development of competition in local distribution markets and (2) competition from alternate technology competing distributors, weigh against finding the continued enforcement of CVI's exclusive contract with Sci-Fi is in the public interest.

Public Interest Benefits of Exclusivity on the Programming Market

Attraction of Capital Investments in Production and Distribution of Programming

23. Both Congress and the Commission recognized that in some circumstances exclusivity can serve as an investment incentive for cable operators to finance, promote and carry a new service.[68] All new programming services face difficulties in launching a service and attracting financial backing. These difficulties may be ameliorated by the ability of the programming vendor to offer exclusive distribution. Congress has placed specific limits on exclusivity arrangements for vertically integrated programming vendors. However, where a vertically integrated programming vendor demonstrates that it faces unique obstacles or limitations in attracting investments and securing carriage agreements for a new programming service such that its viability requires the ability to offer the additional incentive of exclusivity, exclusive distribution may be in the public interest.[69]

24. Petitioners contend that CVI provided Sci-Fi with substantial carriage commitments based upon Sci-Fi's promise of exclusivity.[70] Significantly, however, petitioners do not contend that exclusivity is required for continued survival of Sci-Fi.[71] Rather, petitioners argue that denial of the petition will have some future impact on the ability of programmers to attract capital, contending that "the Commission will significantly impair the ability of new services to raise capital for the production and distribution of new programming services if cable operators know that they cannot count on the exclusivity provisions of their agreements with these programmers."[72]

25. We disagree with petitioners' claim that our denial of exclusivity in this case will limit a new programming vendor's ability to attract financial backing. Under the Commission rules, all exclusive contracts between a vertically integrated programming vendor and a cable operator in an area served by a cable operator must be approved by the Commission to retain enforceability of the exclusivity. The Commission previously stated that whether an exclusive agreement is in the public interest and permitted will be evaluated on a case-by-case basis, using all five statutory public interest factors.[73] Our conclusion here that petitioners have failed to present facts demonstrating that exclusivity is vital for the continued viability of Sci-Fi, does *not* establish a uniform determination that all exclusive contracts between programming vendors, recently acquired by a cable operator and cable operators are not in the public interest. As new petitions for exclusivity are filed, the Commission will make a determination, based on the particular facts of each case, whether the continued enforcement is in the public interest.

26. We recognize that our decision here denies petitioners the benefit of an exclusivity based on a change of ownership beyond their control, and that petitioners may not benefit as they hoped from their financial commitment to Sci-Fi. However, as we noted in *Time Warner*:

> Congress made a policy choice to disfavor such exclusive contracts. In reaching a determination concerning the public benefits of exclusivity, the Commission must balance on a case-by-case basis the public interest supporting a programming vendor's need for investment incentives against the public's interest in access to programming by competing distributors. The private benefits of exclusivity . . . are not at issue.[74]

Likewise, the private benefits of exclusivity to petitioners is not at issue. In addition, petitioners have not shown that exclusivity is necessary for continued investment in and development of Sci-Fi.

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[67] *Time Warner*, 9 FCC Rcd at 3228.

[68] Communications Act § 628(c)(4)(C), 47 U.S.C. § 548(c)(4)(C); *NECN*, 9 FCC Rcd at 3236; *Time Warner*, 9 FCC Rcd at 3228.

[69] *See, e.g., NECN*, 9 FCC Rcd at 3236. In that case the distribution potential for the programming service was limited by the regional focus of the programming, thereby constraining its revenue potential. This limitation distinguished the service from other new launches and justified NECN's use of exclusivity as a tool to attract financial investments and carriage commitments.

[70] Petition at 10.

[71] However, Petitioners do advance a generalized prospective argument contending that "[c]able operators like CVI who find themselves unable to enforce exclusivity provisions because of a change in ownership may themselves be unable to honor their original subscriber commitments. Operators projecting certain revenue levels from the distribution of exclusive services may find their ability to roll out new programming compromised it such exclusivity evaporates." *Id.* at 11 n.17.

[72] *Id.* at 11.

[73] *See Time Warner*, 9 FCC Rcd at 3225, 3229; *First Report and Order*, 8 FCC Rcd at 3385.

[74] *Time Warner*, 9 FCC Rcd at 3229.

Diversity in Programming

27. The statute requires us to consider the effect of exclusivity on diversity in the programming market.[75] Exclusivity may promote diversity by providing incentives for cable operators to promote and carry a new and untested programming service. However, Sci-Fi is an existing and successful programming service. We conclude that petitioners have failed to demonstrate that continued exclusivity for Sci-Fi currently is needed to promote diversity in programming.

28. Petitioners argue that the denial of their petition may limit the ability of innovative (and risky) services to secure carriage commitments. Petitioners argue that Sci-Fi's ability and willingness to engage in innovative and new activities is due in large part to the commitment of operators like to CVI to aggressively roll-out service. As discussed above, we find that petitioners' argument regarding the prospective impact of a denial of their petition on programming diversity is without merit because exclusive arrangements will be evaluated on a case-by-case basis. This argument is essentially an argument against any limitation on exclusivity rather than a particularized argument relating to Sci-Fi.

29. In addition, we find that petitioners' claim that exclusivity supports diversity by providing revenues to support innovative services is irrelevant to our consideration of the effect on diversity of programming. While we encourage Sci-Fi's new and innovative media ventures, the petition seeks exclusivity for the Sci-Fi programming service and not for its other ventures. We conclude that the continued exclusivity for Sci-Fi currently is not needed to promote diversity in programming because Sci-Fi is an existing and successful programming service.[76]

Duration of the Exclusive Agreement

30. The fifth public interest factor the statute requires us to consider is the duration of the contract.[77] Where the duration of the exclusivity is tailored to the minimum period of time reasonably necessary to develop and firmly establish the programming service through assured financing, promotion and marketing, then such limited duration may weigh in favor of allowing exclusivity. We note that the full term of the exclusive contract runs for 8 years. As discussed above, we have determined that Sci-Fi already has attained a significant level of popular appeal to consumers and, therefore, find that continued enforcement of exclusivity for any length of time in this case is not in the public interest.[78]

31. Finally, we note that petitioners reliance on *NECN* is misplaced. Petitioners petition differs in critical respects from the petition in *NECN*, where exclusivity for a period of seven years was approved. *NECN* was a new service struggling to secure carriage commitments; in contrast, Sci-Fi is an established programming service with in excess of 16.3 million subscribers. Moreover, the record in *NECN* demonstrated minimal effects on competition in the relevant distribution market which were offset by countervailing public interest benefits to the programming market. In contrast, we have found no public interest benefits to continued exclusivity in this case.

CONCLUSION

32. Upon consideration of the five statutory public interest factors, we find that petitioners have failed to demonstrate that continued enforcement of CVI's exclusive contract for Sci-Fi is in the public interest. The proposed exclusive agreement withholds a popular service from emerging competitors to cable, such as cable overbuilders, MMDS and SMATV operators, thereby directly constraining the development of competition in the local distribution markets at issue. We further find that no countervailing public benefits will be derived from allowing continued enforcement of the incumbent cable operator's rights to exclusivity. The facts demonstrate that Sci-Fi is a viable, successful programming service with national reach. Exclusivity is not necessary for the survival of the service nor will exclusivity in this case promote diversity in programming.

ORDERING CLAUSE

33. Accordingly, IT IS ORDERED, that the petition for exclusivity filed by CVI and USA requesting a finding that their exclusive contract for the distribution of Sci-Fi is in the public interest IS DENIED.

34. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

[75] Communications Act, § 628(c)(4)(D), 47 U.S.C. § 548(c)(4)(D).

[76] Moreover, granting the petition would have the effect of limiting the availability and diversity of the programming for subscribers to CVI competitors.

[77] Communications Act, § 628(c)(4)(E), 47 U.S.C. § 548(c)(4)(E).

[78] Thus, we similarly reject Petitioners' proposed alternate duration of the exclusive distribution provisions of three years. Because Sci-Fi is a popular programming service currently in demand by at least one CVI competitor, to delay access for three more years adversely will affect the development of MVPD competition, without providing any countervailing benefits to the programming market.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-86

In the Matter of

Amendment of Section 73.202(b), RM-8636
Table of Allotments,
FM Broadcast Stations.
(Frankenmuth, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 30, 1995; Released: September 7, 1995

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 10 FCC Rcd 660 (1995), issued in response to a petition filed by Frankenmuth Broadcasting, Inc. ("petitioner"). The *Notice* proposed the allotment of Channel 229A to Frankenmuth, Michigan, as that community's first local broadcast service. Petitioner filed comments reaffirming its interest in the allotment of Channel 229A at Frankenmuth. No other comments were received.

2. We believe the public interest would be served by allotting Channel 229A to Frankenmuth, Michigan, as it will provide the community with its first local transmission service. Channel 229A can be allotted to Frankenmuth consistent with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 14.9 kilometers (9.3 miles) southeast of the community.[1] The site restriction will prevent a short spacing to Station WBCT, Channel 229B, Grand Rapids, Michigan, and Station CKLW-FM, Channel 230C1, Windsor, Ontario, Canada. Concurrence has been received from the Canadian government for Channel 229A as a specially negotiated, short-spaced allotment.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 23,1995,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Frankenmuth, Michigan	229A

4. The window period for filing applications for Channel 229A at Frankenmuth will open on **October 23, 1995**, and close on **November 24, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 229a at Frankenmuth are 43-18-21 and 83-33-28.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-53

In the Matter of

Amendment of Section 73.202(b), RM-8613
Table of Allotments,
FM Broadcast Stations.
(Eugene, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 30, 1995; Released: September 7, 1995

By the Chief, Allocations Branch:

1. At the request of Conway Broadcasting ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 10 FCC Rcd 4844 (1995), proposing the allotment of Channel 265A to Eugene, Oregon, as the community's fifth local FM service. Petitioner filed comments reiterating its intention to apply for the channel. McCoy Broadcasting Company ("McCoy") also filed comments stating an intention to apply for the channel, if allotted. McKenzie River Broadcasting Co. ("McKenzie"), licensee of Station KMGE(FM), Eugene, and Combined Communications, Inc. ("Combined"), licensee of Station KUGN-AM/FM, Eugene, filed comments in opposition. Petitioner filed reply comments.

2. Both McKenzie and Combined state that Channel 265A cannot be allotted to Eugene in compliance with the Commission's technical requirements because a high promontory rising almost 700 feet between the proposed transmitter site area and Eugene prevents line-of-sight coverage to approximately 50-80% of the community. They point out that Section 73.315(b) of the Commission's Rules states that the transmitter site should be chosen so that line-of-sight coverage can be provided to the community of license and that there should be no major obstruction between the transmitter and the community. According to Combined, it will require an antenna tower of at least 600 meters to achieve satisfactory line-of-sight service. However, it states that the Federal Aviation Administration ("FAA") will not grant approval for such a tall tower at this location because the coordinates proposed in the *Notice* are only 1.6 kilometers (1 mile) from Interstate 5. According to Combined, all interstate freeways are considered by the FAA to be flyways for General Aviation and that the FAA has a policy that limits tower heights to no more than 150 meters where they are located within 3.2 kilometers (2 miles) of an interstate freeway. Further, both McKenzie and Combined state that no other transmitter site area can be used because of the need to protect Stations KZUS-FM, Channel 264C2, Toledo, Oregon, to the west, KUFO-FM, Channel 266C, Portland, Oregon, to the north, KCGR, Channel 263A, Cottage Grove, Oregon, to the south and terrain problems to the east. In view of these difficulties, Combined contends that the Commission cannot allot the requested channel unless the petitioner demonstrates that it can provide all of Eugene with a 70 dBu signal from the proposed transmitter site, citing *Creswell, Oregon*, 3 FCC Rcd 4608 (1988), *recon. denied*, 4 FCC Rcd 7040 (1989).

3. In response, petitioner argues that it is not required to specify a particular transmitter site and demonstrate its compliance with the Commission's rules at the rule making stage. Rather, it states that a petitioner must only show that a theoretical transmitter site area exists, citing *Pinckneyville, Illinois*, 41 R.R. 2d 69 (1977). Further, it contends, citing *Natchitoches, Louisiana*, 52 R.R. 2d 1558, 1561 (1983), that the Commission only requires proof of city-grade coverage in cases "involving site restrictions of approximately 6.5 to 8 miles measured from the city's center." Thus, since the Eugene allotment requires a site restriction of only 4.4 miles from Eugene, it argues that no proof of city-grade coverage is required. In addition, it states that city coverage is determined by reference to Section 73.313 of the Commission's rules "without reference to possible obstructions." Nevertheless, petitioner states that there is a "short-spaced site available less than 1 km from the fully spaced boundary that would provide a high antenna elevation without necessitating construction of a tall tower" and that the site could be utilized by providing contour protection as specified in Section 73.215 of the Commission's rules.

DISCUSSION

4. After carefully considering the pleadings before us, we find that Channel 265A cannot be allotted to Eugene in compliance with the Commission's technical requirements. Generally, a rule making proponent only needs to show that a theoretical site exists which complies with the Commission's minimum distance separation and other technical requirements. However, where, as here, a showing has been made that a terrain obstruction exists which would prevent compliance with the Commission's technical requirements concerning city-grade and line-of-sight service, the Commission requires the proponent to provide an engineering study showing that the allotment can indeed be made in conformance with the technical rules. *See Creswell, Oregon, supra.* This the petitioner has failed to do.

5. Petitioner misconstrues the decisions in *Natchitoches, Louisiana*, and *Pinckneyville, Illinois, supra.* In *Natchitoches*, the Commission requested in the *Notice of Proposed Rule Making* that the petitioner provide a showing demonstrating that the proposed channel could provide the community with the required 70 dBu city-grade signal because the allotment required a site restriction close to the limit where such coverage could be assumed. Because a different channel was ultimately proposed by the Commission and then allotted, with a much less severe site restriction, no specific showing of city-grade coverage was included in the record. On review, the opponent of the allotment requested the deletion of the channel based on the lack of engineering showings. However, the opponent did not provide any evidence demonstrating a need for such a showing. Thus, in response, the Commission stated that:

> For small communities, the type usually requesting Class A assignments, the distance from the center of the community to its city limit is usually around one to two miles. Therefore, the Bureau requests proof of

> city coverage only in cases involving site restrictions of approximately 6.5 to 8 miles measured from the city's center.

52 R.R. 2d 1561. In *Pinckneyville*, the Commission deleted a previously allotted channel because, at the application stage, it was found that no transmitter site was available which would comply with both the Commission's mileage separation and city coverage requirements. In so doing, the Commission stated:

> Ordinarily, there is no need to specify a particular site, it is only necessary to show that a suitable site area exists. However, in some cases, clarification may be necessary and an additional showing may be required before we can make the assignment. This was true here because of a concern about being able to find a site that met the spacing requirements and which would provide the requisite city coverage. In the usual case or even one where additional assurance was required, it sometimes happens that a site thought to be available turns out not to be. As a result, the applicant for use of the channel may be forced to specify another site, even one not meeting spacing requirements. This does not cast doubt on the underlying assignment if there had been a reasonable basis for believing a site was available. However, if this were note the case, the assignment rested on a false premise and should be deleted. . .. Such reasonable availability is the premise on which any assignment must result, and without it we must conclude that this assignment was erroneously made. In fact, not only is it now clear that there were questions existing at the time, but it is also clear that the Commission was not given the information necessary to make a decision. Had it been, the assignment would not have been made.

41 RR 2d 71-72. Thus, these decisions do not deny the Commission's right, and, in fact, elucidate the obligation, to require further technical showings for allotments where but evidence of signal coverage problems are provided, regardless of whether a site restriction is needed or not.

6. Regardless, a terrain profile analysis performed by the staff confirms that unobstructed line-of-sight 70 dBu service is not possible without an antenna height of at least 225 meters. It appears that petitioner concedes that there is no transmitter site available which complies with the Commission's technical requirements since it does not refute the opponents showings but instead proposes the use of a transmitter site which does not comply with the minimum distance separation requirements. We cannot find that the allotment of a fifth local FM transmission service to Eugene is a sufficiently compelling public interest benefit to justify a substandard allotment. *See Chester and Wedgefield, South Carolina, recon. denied.*, 4 FCC Rcd 4503 (1989), *rev. denied*, 5 FCC Rcd 5572 (1990). *aff'd*,, Case No. 90-1496, D.C. Cir. (1991) (June 6, 1991).

7. Accordingly, IT IS ORDERED, That the petition of Conway Broadcasting (RM-8613) to allot Channel 265A to Eugene, Oregon, IS DENIED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Sevier Valley Broadcasting, Inc.
(Assignor) File Nos. BAL-931201GN
BALH-931201GO
and BALFT-931201GM

Mid-Utah Radio, Inc.
(Assignee)

For Assignment of Licenses of
Radio Stations KSVC(AM) and KKWZ(FM),
and FM Translator Station K252CO,
Richfield, Utah

MEMORANDUM OPINION AND ORDER

Adopted: August 21, 1995; Released: September 7, 1995

By the Commission:

1. The Commission has before it an Application for Review filed by White Pine Communications, Inc. ("White Pine") of a September 15, 1994, letter ("Letter Ruling") from the Chief, Audio Services Division, Mass Media Bureau ("Bureau"). By that letter, the Bureau granted the above-captioned applications for assignment of licenses of Radio Stations KSVC(AM) and KKWZ(FM), and FM Translator Station K252CO, Richfield, Utah, from Sevier Valley Broadcasting, Inc. ("Sevier") to Mid-Utah Radio, Inc. ("Mid-Utah"). Also before the Commission is Mid-Utah's Opposition and White Pine's Reply thereto. Finally, the Commission has before it a Motion for Stay filed by White Pine, Mid-Utah's Motion for Acceptance of Late-Filed Opposition to Motion for Stay and its Opposition, and White Pine's Opposition thereto.[1] As set forth below, we affirm the Bureau's action granting the above-captioned assignment applications.

I. BACKGROUND

2. Marianne M. Barton is the sole officer, director, and stockholder of Mid-Utah. Her husband, Douglas Barton, is a forty percent shareholder, President, and a director of Sanpete County Broadcasting Co., licensee of Stations KMTI(AM) and KMXU(FM), Manti, Utah. He is also the sole shareholder, President and a director of KNAK, Inc., licensee of Station KNAK(AM), Delta, Utah. The principal community contours of the subject stations, KSVC(AM) and KKWZ(FM), overlap. In addition, the KSVC(AM) and KKWZ(FM) contours overlap the principal community contours of Stations KMTI(AM) and KMXU(FM). A construction permit to modify the facilities of Station KKWZ has been issued and, as modified, the principal community contour of Station KKWZ(FM) will increase the overlap with Stations KMTI(AM) and KMXU(FM). KKWZ(FM)'s modified principal community contour will also overlap the principal community contour of Station KNAK(AM).

3. White Pine is a singleton applicant for a new FM station in Richfield, Utah (File No. BPH-930527MF). On January 14, 1994, it filed a Petition to Deny the above-captioned applications. In its Petition, White Pine asserts that Mr. Barton's media interests must be attributed to Mrs. Barton and, therefore, that the assignment applications could not be granted because the resulting ownership structure violated Section 73.3555(a)(1)(i) of the Commission's multiple ownership rules.[2] In addition, inpreply to Mid-Utah's response to a Bureau letter of inquiry, White Pine asserted that Mid-Utah was not financially qualified at the time the assignment applications were filed.

4. By its Letter Ruling, the Bureau found that White Pine, as a "mere applicant," did not have standing to file a Petition to Deny, but considered the pleading as an informal objection. Looking to the merits, the Bureau held that the "totality of the materials" submitted did not raise a "substantial and material question of fact regarding the proposed transaction." Specifically, the Bureau held that there was insufficient evidence to conclude that Mr. Barton would control Mid-Utah or any stations licensed thereto, or that the Bartons' marital relationship was being used to evade the Commission's multiple ownership rules.

5. White Pine now challenges the Bureau's decision. First, White Pine alleges that the Bureau erred in holding that it did not have standing to file a petition to deny. In addition, White Pine contends that the Bureau's refusal to attribute Mr. Barton's media interests to Mrs. Barton and, as a result, to prohibit the assignment as violative of the multiple ownership rules, is in conflict with established Commission policy. White Pine further asserts that the Bureau made "erroneous findings as to important and material questions of fact." It also urges Commission review of the Bureau's decision because few spousal attribution cases have been decided since the Commission's

[1] We hereby deny White Pine's Motion for Stay and dismiss as moot Mid-Utah's Motion for Acceptance of Late-Filed Opposition to Motion for Stay. White Pine has failed to meet the criteria for a stay as set forth in *Virginia Petroleum Jobbers v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958), *modified, Washington Metropolitan Transit Commission v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977). Most significantly, White Pine has not shown that irreparable injury would occur absent a stay of the assignment. As a mere applicant for a competing station in the market, White Pine could not allege any personal harm and only vaguely argued, without specifics, that some general public harm would occur if a stay were not granted.

[2] Section 73.3555(a)(1)(i) of the Commission's Rules limits the common ownership of radio stations whose principal community contours overlap. Specifically, in "radio markets" with fourteen or fewer commercial radio stations, such as the market involved in this case, a party may not own more than three commercial radio stations (no more than two of which are in the same service). If Mr. Barton's media interests are attributed to Mrs. Barton, their combined holdings would exceed the maximum number of stations permitted in a radio market.

issuance of the *Policy Statement, Clarification of Commission Policies Regarding Spousal Attribution,* 7 FCC Rcd 1920 (1992) (*"Policy Statement"*), and the Commission has yet to review a spousal attribution case under the new policy. Finally, White Pine contends that the Bureau erred in granting the assignment applications because Mid-Utah was not financially qualified at the time the assignment applications were filed.

II. DISCUSSION

A. Standing

6. White Pine argues that the Bureau incorrectly held that it did not have standing to file a petition to deny in this proceeding. However, as the Bureau stated in its Letter Ruling, White Pine, as an applicant, lacks standing to file a petition to deny because it is only a potential competitor. An applicant, even a sole applicant, is not assured that its application will be granted and that it will, in fact, be a competitor in the market. *See Mansfield Journal Co. v. FCC,* 173 F.2d 646 (D.C. Cir. 1949) (where the Commission severed a competing application for a new FM station because it was possible, as a result of additional allocations, to grant all three applicants permits for new FM stations, the remaining applicants did not have standing to challenge grant of the severed application); *Syracuse Channel 62, Inc.,* 60 RR 2d 1161, 1165 (1986) (assignee lacks standing to file a petition to deny an application in the same market, even though assignment application was granted, because assignment had not yet been consummated and there was no guarantee that it would be).[3]

7. The Bureau nonetheless considered White Pine's Petition to Deny as an informal objection and addressed the merits raised therein. Because this case is the Commission's first opportunity to review a spousal attribution decision applying the *Policy Statement,* we will also address White Pine's arguments on the merits.

B. Spousal Attribution

8. In its *Policy Statement,* the Commission revised its spousal attribution policy, ruling that "the media interests of one spouse will not be presumptively attributed to the other solely on the basis of marital status." 7 FCC Rcd at 1920. In so ruling, we held that the Commission would treat marital relationships the same as other family relationships for attribution purposes. Accordingly, we concluded that in each case we would look at the specific facts and circumstances presented to determine whether the spouses' media interests will be independent and not subject to common influence or control. To assist the Commission in reaching such a case-by-case determination, and to "guide" spouses seeking to establish independence, we enunciated seven factors that we have considered relevant in the past to issues of family attribution.

9. The seven factors set forth in the *Policy Statement* are: (i) representations that the media interests of close family members will be independent and will not be subject to common influence or control; (ii) commingling of ownership or other interests in media businesses; (iii) participation of family members in the financial affairs, programming, and personnel decisions of each others media interests; (iv) prior broadcast experience of the individual seeking to establish independent interests; (v) financial independence; (vi) sharing of personnel, equipment, contractors, or information regarding programming; and (vii) involvement by family members in the acquisition or application process. 7 FCC Rcd at 1922-23.

10. White Pine characterizes these factors as a "seven-part test," suggesting that they must be applied on essentially a pass-fail basis to determine whether or not there will be common control. It argues that Mid-Utah has only "met" one of the seven factors and, thus, that the Bureau's grant of the assignment applications was contrary to stated Commission policy.[4] Further, White Pine contends that in applying the seven factors to this case, the Bureau made erroneous findings as to important and material questions of fact.

11. White Pine has mischaracterized the Commission's position in the *Policy Statement.* The seven factors are not components of a test which must be met in order to demonstrate spousal independence. They are simply aspects of a family relationship or proposed transaction that should be considered when making a determination regarding spousal, or any family, attribution. The weight that the Commission affords to any particular factor will vary from case-to-case depending upon the record as a whole.[5] Further, the existence or non-existence of one, or many, of the

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[3] White Pine asserts that, as a singleton applicant, it has greater legal rights and is exposed to greater risks than a mutually exclusive applicant. Accordingly, White Pine contends, it should have standing to file a petition to deny an assignment application in the same market in which its application is pending. In support of its contention that singleton applicants have greater legal rights, it cites to *Modification of FCC Comparative Proceedings Freeze Policy,* 9 FCC Rcd 6689 (1994) (*"Public Notice"*). In that *Public Notice,* the Commission stated that it would resume processing non-mutually exclusive applications, but would continue its freeze on processing mutually exclusive applications where the applicants' comparative qualifications are at issue. The Commission did not grant singleton applicants greater legal rights in its *Public Notice.* Rather, it merely allowed the continued processing of applications that did not require the use of the comparative criteria under review. This action was intended only to "permit the continued authorization of broadcast services to the greatest extent possible." Accordingly, there is no merit to White Pine's assertions in this regard.

[4] Mid-Utah reiterates its argument below that White Pine's allegations are not supported by affidavit(s) of person(s) with personal knowledge of the facts as required by Section 309(d) of the Communications Act of 1934, as amended. However, as White Pine indicates, its allegations, for the most part, are based on facts contained in Mid-Utah's application, pleadings, and declarations, and we find they are, therefore, appropriately considered.

[5] *See,* for example, *Dorothy J. Owens,* 5 FCC Rcd 6615 (1990). Ms. Owens was an officer and a director of a company solely owned by her brother. In addition, she was actively involved in the management of a station owned by that company. Accordingly, in granting her application for a new station in the same market, the Commission required her to divest all connections with her brother's stations. When faced with the issues of whether Ms. Owens had really severed her connection with her brother's company and whether her brother had any control over her station, the Commission found no common control, despite the existence of several of the factors enunciated in the *Policy Statement,* including the fact that Ms. Owens and her brother had entered into a studio lease agreement and advertising contract, and her brother had personally guaranteed a loan

factors is not necessarily dispositive.[6] Nor is the Commission's review limited to the seven factors set forth in the *Policy Statement*. Rather, in reaching a decision, the Commission looks at the totality of the circumstances, weighing all the evidence before it to determine whether or not the spouses' media interests will be independent and not subject to common influence or control.

12. In this case, as discussed below, the Bureau carefully reviewed each factor and correctly analyzed the evidence pertinent to each one. Weighing all the evidence before it, the Bureau correctly determined that the record, taken as a whole, does not raise a substantial and material question of fact regarding the independence of Mr. and Mrs. Barton's broadcast interests. Accordingly, we affirm the Bureau's conclusion that the proposed transaction did not violate the Commission's multiple ownership rules.

13. *Representations of Independent Control.* Mr. and Mrs. Barton have filed declarations, under penalty of perjury, indicating that they will independently manage their separate media interests and that there will be no common influence or control of such interests. While White Pine cannot dispute the existence of such representations, it contends that the representations are only "untested promises," which cannot be relied upon. White Pine has not, however, provided any evidence that Mr. and Mrs. Barton will not, in fact, operate their stations independently as asserted in their declarations.

14. Mr. Barton states in his declaration that he has "neither the time nor the desire to involve [himself] in additional radio stations." Mrs. Barton declares that the idea of owning a station was her own, not her husband's, and that she wanted to acquire the stations "in order to follow other interests and financial opportunities." She indicates that she has been exposed to the broadcast business through her husband and has attended many broadcast industry conventions. In addition, she states that she "was first approached about the sale of the radio station by Kent Colby himself -- the present owner -- not [her] husband." She declares that she will be the chief executive officer and will make all the decisions regarding "programming, editorial positions, and staff." In addition, she states that she will personally keep all the financial books and records of the stations. She plans to work at the station on a full-time basis "to get things going properly," and then to cut-back her hours at the station to part-time so that she will be able to "continue with her long-time nursing career and maintain her nursing license. As discussed below, to allow her to do so, and to compensate for her lack of broadcast experience, she plans to hire an experienced general manager.

15. *Commingling of Interests; Participation in Financial Affairs, Programming, and Personnel Decisions.* Mr. and Mrs. Barton affirmatively state, under penalty of perjury, that they will not participate in the financial affairs, programming, and personnel decisions of each other's stations. Mrs. Barton indicates that at one time she held officer positions in her husbands companies, but that she did so solely because, at that time, Utah corporations were required to have more than one officer. She indicates that Utah law has changed and that she resigned from her positions effective April 1, 1993. Mrs. Barton states that she has never been involved in the day-to-day operation of Mr. Barton's stations, that she currently has no involvement in her husband's businesses, and that she will have no involvement in the future.[7]

16. White Pine argues that Mrs. Bartons past officer positions in Mr. Bartons companies demonstrate her participation in the financial, programming, and personnel decisions of Mr. Bartons stations, as well as a commingling of ownership interests. The Commission has long held that past involvement in a family members business, even if substantial, does not necessarily demonstrate future involvement or a commingling of ownership interests. *See Kern Broadcasting Corporation*, FCC 95-214, released June 16, 1995 (so long as applicant divested his broadcast interests in facilities held by father and brother in market at issue, no attribution required despite the fact that applicant would retain broadcast interests with father and brother in another market); *Dorothy J. Owens*, 5 FCC Rcd 6615 (1990) (so long as relationship with brothers company is severed, no attribution necessary); and *Southern Indiana Broadcasters, Inc.*, 14 RR 117 (1956) (past employment at fathers station does not warrant addition of a multiple ownership issue). In this case, the record reveals that Mrs. Barton only had a nominal involvement in her husbands businesses, that she never had any involvement in the day-to-day operation of her husband's stations, and that she has resigned her interests in her husband's companies. Thus, Mrs. Barton's past involvement, absent any evidence that it will continue, does not raise a substantial and material question of fact regarding common influence or control of the Bartons' media interests.

17. *Prior Broadcast Experience.* White Pine argues that Mrs. Bartons lack of prior broadcast experience must be "counted against upholding the transaction." Further, it contends that the Bureau erred in "rejecting" this factor

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obtained by Ms. Owens. Weighing all the evidence before it, the Commission concluded that there were only arms-length transactions between brother and sister and that the record did not contain any evidence that either actually influenced or controlled the other's broadcast interests.

[6] For example, we noted in the *Policy Statement* that although the existence of financial and business ties (two of the seven enunciated factors) are indicia of common ownership and control in non-family relationships, we do not attribute interests based solely on these characteristics in family attribution cases because such characteristics are "often part and parcel of the relationship and attribution would thus create unfair obstacles to media ownership." *Policy Statement*, 7 FCC Rcd at 1923. Similarly, we recognized that spousal relationships "possess certain qualities" that might indicate common influence or control in other family relationships, but which would not necessarily be indicia of control in a spousal relationship.

[7] Mrs. Barton admits to frequent conversations with her husband about his broadcast businesses over the past seventeen years. White Pine alleges that such conversations show an involvement in his businesses. Further, White Pine challenges Mid-Utah's characterization of those conversations as discussions which "touched on" Mr. Barton's businesses. We do not find such differing characterizations of Mrs. Barton's conversations with her husband to be necessarily inconsistent or to rise to the level of misrepresentation. In any event, as the Bureau correctly stated, such conversations, which are characteristic of marital relationships, do not indicate Mrs. Barton's personal involvement in Mr. Bartons businesses, and clearly do not demonstrate a future involvement in each other's stations.

because of Mrs. Bartons promise to hire an experienced general manager. Once again, White Pine has mischaracterized the relevancy of each of the seven factors set forth in the *Policy Statement*, and the Bureaus analysis under the *Policy Statement*. While priorbroadcast experience is a relevant factor which must be weighed in making an attribution determination, it is only one element to be considered and the weight accorded any lack of broadcast experience must be determined in the specific context of the case at hand. Here, the Bureau correctly discounted this factor on the grounds that Mrs. Barton intended to hire an experienced general manager to compensate for her lack of experience.[8] White Pine asserts that it is Mr. Barton who will actually compensate for Mrs. Bartons lack of broadcast experience, stating that it is unlikely that Mrs. Barton will not turn to her husband for advice. However, as the Bureau correctly noted, this argument is speculative. In any event, even if the record did contain evidence that Mr. Barton would provide such advice to his wife, the Commission has held that the existence of aid or advice by family members does not require a conclusion of common control. *Stuart W. Epperson*, 35 FCC 565, 568 (Rev. Bd. 1963).[9]

18. *Financial Independence*. White Pine contends that the Bureau incorrectly found that Mrs. Barton was financially independent from her husband. However, White Pine has provided no evidence that Mrs. Barton is relying on her husband, in any way, to finance the acquisition or the operation of the stations. Instead, as discussed below, it questions Mrs. Barton's financial qualifications and points to what it considers "anomalies" in the financing arrangements, none of which indicate Mr. Barton's financial involvement.

19. Mrs. Barton has submitted declarations under penalty of perjury, stating that she paid the good faith deposit on the purchase price from her own personal funds and that she applied for and obtained a loan from her bank to finance closing and subsequent costs. She states, and a May 27, 1994, letter from Zions First National Bank (the "Bank Letter") confirms, that she personally arranged for and applied for the loan, that her personal property would be used as collateral for the loan, and that only she and Mid-Utah would be signatories to the loan. In addition, the record reveals that Mrs. Barton has her own personal checking account at Zions First National Bank and that she has a more than 20-year banking history with that bank. White Pine cannot rebut these facts, but contends that the Bank Letter is a mere "accommodation letter" and that Mrs. Barton's financial estimates for operation of the station are faulty.[10] Thus, White Pine argues, it is likely that her husband will participate in the financing of the acquisition and operation of Stations KSVC(AM), KKWZ(FM), and K252CO. However, as the Bureau correctly held, White Pine's conclusion in this regard is entirely speculative. Further, even if there was some merit to White Pine's allegations, the Commission has consistently held that financing of a family member's business does not demonstrate control requiring attribution. *See North Idaho Broadcasting, Company*, 8 FCC Rcd 1637 (1993); *Dorothy J. Owens*, 5 FCC Rcd at 6617; *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 435 (Rev. Bd. 1983).

20. *Sharing of Personnel, Equipment, Contractors, or Information; Involvement in the Acquisition or Application Process*. White Pine points to the fact that Mr. and Mrs. Barton share legal counsel and that Mr. Barton prepared part of Mrs. Barton's assignment applications, as evidence requiring a finding of attribution. The Commission, however, has held in prior family attribution decisions that the sharing of counsel and engineers does not necessitate a finding of attribution. *See Cannon's Point Broadcasting*, 93 FCC 2d 643 (Rev. Bd. 1983), *rev. denied*, FCC 84-161 (April 16, 1984), *remanded on other grounds, Steele v. FCC*, 720 F.2d 1195 (D.C. Cir. 1985) (subsequent history omitted) (daughter's use of same communications counsel as father is insufficient basis for designation of real party-in-interest issue); *Stuart W. Epperson*, 35 FCC at 568 (sharing of attorney and engineer in connection with past applications does not require finding of common control when there is abundant direct testimony to the contrary). In this case, Mrs. Barton explains that she chose to use the same attorney as her husband because she has known the attorney personally for a number of years and has confidence in his work. In addition, she states that she has a separate account with the law firm. Accordingly, while Mrs. Barton's use of the same law firm as her husband is relevant, we do not find it to be of any more than minor significance in this case, particularly since Mrs. Barton indicates that she has known the attorney personally for a number of years and that the choice to use him as her counsel was her own.

21. Further, as the Bureau held, Mrs. Barton has satisfactorily explained why her husband prepared the engineering exhibit. Specifically, Mrs. Barton states that her husband was uniquely in the position to prepare such a showing since he was an engineer, knew the contours of his own stations, and had recently prepared a similar engineering showing. She further asserts that she obtained the necessary contour information from Sevier and provided it to her

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[8] In its Application for Review, White Pine contends that the salary Mrs. Barton proposed to pay a general manager would not be sufficient to hire an experienced manager and, thus, that she will need further assistance. This argument is purely speculative and White Pine has provided the Commission with no evidence to support its bare assertions in this regard.

[9] Relying on *Marvin J. Diamond*, 4 FCC Rcd 8526 (1989), White Pine suggests that broadcast experience is necessary, or at least crucial, to a finding of no attribution. In *Marvin J. Diamond*, the Commission found that the presumption of spousal attribution was rebutted because the husband and wife held positions in large diverse companies whose sole activity was not broadcasting. In reaching such a determination, the Commission relied on the fact that the husband and wife had separate careers for more than ten years and that they had reached their current positions "by reason of their individual abilities and efforts." 4 FCC Rcd at 8528. However, as the Bureau correctly held, White Pine's reliance on *Marvin J. Diamond*, 4 FCC Rcd 8526 (1989), is misplaced. The issue in *Marvin J. Diamond* was whether the presumption of spousal attribution had been rebutted. That decision predates the *Policy Statement* that removed the presumption of spousal attribution. In any event, the Bureau did not, as White Pine contends, "write off" its arguments regarding this case. The Bureau responded to White Pines assertions concerning *Marvin J. Diamond* and we uphold the Bureaus findings in this regard. Letter Ruling at 5, n.11.

[10] A number of White Pine's financial allegations were made in pleadings subsequent to the Petition to Deny. Thus, Mid-Utah contends they are not properly considered. Recognizing that the financial information to which White Pine responds was not available to White Pine at the time the Petition to Deny was filed, we have considered such allegations herein.

husband. In any event, Mr. Barton's preparation of an engineering map to accompany the assignment applications does not, as White Pine alleges, constitute "material involvement" in the application process. The inclusion of an engineering exhibit in Mid-Utah's application is of no decisional significance. While we are concerned that Mr. Barton did have some involvement in the preparation of Mrs. Barton's application and it is a factor which must be weighed in making our attribution decision, we do not accord his participation any significant weight because the record reveals that he only had a one-time nominal involvement in his wife's application. Further, based on the record before us, we cannot conclude that Mr. Barton will have any additional involvement in his wife's stations, particularly in light of Mr. and Mrs. Barton's specific declarations to the contrary. *See Alabama Radio Corporation*, 69 FCC 2d 1256 (1978) (the fact that son is an engineering consultant for mother's station does not require attribution where he is not the Chief Engineer and is not responsible for the daily maintenance and technical operation of the station). *Compare Rayne Broadcasting Co., Inc.*, 5 FCC Rcd 3350 (Rev. Bd. 1990) (hearing warranted where husband prepared engineering portion of application, played key role in drafting business plan, negotiated with site owner, drafted land option, and actively participated in settlement negotiations).[11]

22. In sum, the evidence taken as a whole does not raise a substantial and material question of fact regarding the independence of Mr. and Mrs. Barton's broadcasts interests. Mr. and Mrs. Barton have both declared, under penalty of perjury, that their broadcast interests will be independently managed and that there will be no common influence or control. Further, while Mrs. Barton was, at one time, involved in her husband's businesses, her involvement was only nominal and should be accorded no decisional significance. The record indicates that Mrs. Barton has pursued a career separate from her husband for a number of years and that it was her decision to acquire a broadcast station to pursue new "interests and financial opportunities." She affirmatively states that she will be responsible for the programming, personnel and financial affairs of the stations at issue, and that she will hire an experienced general manager to compensate for her lack of broadcast experience. In addition, there is no evidence that Mr. Barton had or will have any financial involvement in the acquisition or the operation of Mrs. Barton's stations. We recognize that certain facts, including the use of the same legal counsel and Mr. Barton's involvement in the preparation of Mid-Utah's assignment application, may be viewed as suggesting a potential for involvement in each other's stations. However, absent significant speculation, we cannot conclude that there will be common influence or control of the Bartons' media interests. Accordingly, based upon the record before us, we find that the acquisition of Stations KSVC(AM), KKWZ(FM), and K252CO by Mid-Utah does not violate our multiple ownership rules. Should it come to our attention, however, that, as operated, there is common influence or control of the Bartons' media interests, as has always been our policy, we will apply the full weight of available sanctions. *See Policy Statement* at 1923.

C. Financial Qualifications

23. As discussed in paragraph 16, *supra*, White Pine also questions whether or not Mrs. Barton was financially qualified at the time she filed the assignment applications. As noted above, the record reveals that Mrs. Barton has had over a 20-year relationship with Zions First National Bank and that there was a meaningful dialogue between Mrs. Barton and her bank prior to filing the assignment applications, during which the amount of the loan and the source of the collateral were determined. In addition, in its follow-up Bank Letter, Zion's First National Bank confirmed that it had given Mrs. Barton reasonable assurance that the loan would be approved upon grant of the assignment applications. Further, there is no evidence of any intent to deceive by Mrs. Barton when she certified her financial qualifications and, thus, no basis for finding any misrepresentation to the Commission. *See Armando Garcia*, 3 FCC Rcd 1065 (Rev. Bd. 1988), *rev. denied*, FCC 88-258 (1988) (substantial evidence of an intent to deceive is the sine qua non of any prospective misrepresentation issue). In any event, we note that the assignment was consummated on December 30, 1994, over six months ago. Thus, given the facts of this case, it would serve no useful purpose to designate the applications for hearing at this late date on a financial qualifications issue. *See Georgia Public Telecommunications Commission*, 7 FCC Rcd 2942, 2949 (Rev. Bd. 1992), *rev. denied*, FCC 92-523 (1992) (no useful purpose served by remanding to determine whether applicant was financially qualified at the time the application was filed since applicant is currently financially qualified).

III. CONCLUSION

24. Based on the totality of the evidence before us, we are unable to conclude that Mr. and Mrs. Barton will, in fact, be involved in or have any control over each other's media interests. Further, the record does not demonstrate that Mr. and Mrs. Barton are using their marital relationship to evade the Commission's ownership rules. Finally, having reviewed all of White Pine's arguments, we conclude that the Bureau correctly held that there is no substantial and material question of fact regarding the proposed transaction which would require designation of the assignment applications for hearing.

25. Accordingly, in view of the foregoing and pursuant to 47 C.F.R. § 1.115(g), IT IS ORDERED, that the Application for Review filed by White Pine Communications, Inc. IS DENIED.

[11] White Pine reiterates its argument that *Gloria Bell Byrd*, 8 FCC Rcd 7124 (1993), requires a finding that Mr. Barton will be involved in his wife's business. However, that case is inapposite. In *Gloria Bell Byrd* the Commission denied an applicant's integration credit because, among other reasons, the limited partner endorsed the bank's signature card, thereby giving him authority to draw checks on the account without the general partner's endorsement. Unlike this case, the endorsement of a signature card does not represent a one-time only involvement, but bestows a continued right to be involved in an applicant's financial affairs.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

St. Joseph's Cablevision — CUID No. MO0046 (City of St. Joseph)

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: August 8, 1995; Released: September 8, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above on the ground that the complaint concerns a rate that is outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon the filing of a valid complaint.[1] Our review reveals that the complaint filed against Operator, while asserting that it challenges a CPS rate, challenges only a rate for basic service, not for CPS. In particular, the record shows that Operator offered only a basic tier of service, and not a CPS tier, in this community. The complaint therefore does not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaint filed prior to May 15, 1994 against the cable programming service price charged by Operator in the community referenced in the caption IS DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Jones Spacelink of Ohio — CUID No. OH0293 (Rittman)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: August 8, 1995; Released: September 8, 1995

By the Chief, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The complaint in the franchise area which is the subject of this Order was completed and served on Operator on February 25, 1994 and received by the Commission on February 28, 1994. On June 6, 1994 Operator filed FCC Form 393 in response.

5. Operator asserts that its monthly CPS tier price of $11.58 (plus franchise fee) is higher than the maximum permitted charge of $11.38 per month (plus franchise fee), as calculated in the filing. Thus, Operator has failed to show that its CPS tier price is not unreasonable. However, upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. Operator's Form 393, Part II, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Since Operator restructured its rates, including its equipment rates, on September 1, 1993, the current monthly equipment revenue figure it entered on Line 104 should have been close or identical to its equipment cost figure on Part III, Step G, Line 34.[11] However, Operator's entries on these two lines differed substantially. We therefore adjust Line 104 to equal the amount entered on Line 34.

b. Operator calculated the Inflation Adjustment Factor (Form 393, Part II, Worksheet 1, Line 127 and Form 393, Part II, Worksheet 4, Line 401) as of the end of March 1994. However, Operator's use of March 1994 as the date through which it calculated the inflation adjustment is impermissible. The instructions to FCC Form 393, page 11, require that the Inflation Adjustment Factor be calculated using the "number of whole months from September 30,

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *See* Questions and Answers on completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

1992 to the date you will submit this form." In general, a cable operator must submit a justification of its rates no more than 30 days after service of the earliest valid complaint.[12] Operator was served with the rate complaint on February 25, 1994. Since Operator was required to file a rate justification no later than March 28, 1994, Operator should have used February 1994 as the base date for calculating the Inflation Adjustment Factor. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the correct base date.[13] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor of 1.039 through February 1994, the base date Operator should have used in justifying its rate.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $11.13 per month (plus franchise fee) for the period from February 28, 1994 to May 14, 1994.[14]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the franchise area referenced in the caption IS GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the franchise area referenced in the caption that portion of the amount paid for cable programming service for the period from February 28, 1994[15] to May 14, 1994 which exceeded the maximum price of $11.13 per month (plus franchise fee), plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the franchise area referenced in the caption, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price of $11.13 (plus franchise fee).[16]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[12] 47 C.F.R. § 76.956(a).

[13] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[14] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[16] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US Cable Corporation — CUID No. NJ0566 (Paterson)
Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: August 8, 1995; Released: September 8, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaint in the franchise area which is the subject of this Order was completed and served on Operator on February 22, 1994 and received by the Commission on February 28, 1994. Operator filed FCC Form 393 in response; Operator has also filed amended and supplemental Form 393 filings, most recently on January 17, 1995.[11]

5. Operator asserts that its monthly CPS tier price of $13.27 (plus franchise fee) is higher than its maximum permitted charge of $13.15 per month (plus franchise fee), as calculated in the filing. Thus, Operator has failed to demonstrate that its monthly CPS tier price is not unreasonable. In addition, upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. Operator's Form 393, Part II, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Since Operator restructured its rates, including its equipment rates, on September 1, 1993, the current monthly equipment revenue figure it entered on Line 104 should have been close or identical to its equipment cost figure on Part III, Step G, Line 34.[12]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator filed an amended FCC Form 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994). Operator also submitted additional information in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings. Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994) and Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 95-87 (Jan. 20, 1995) (together, *Public Notice*).

[12] See Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have

However, Operator's entries on these two lines differed substantially. We therefore adjusted Line 104 to equal the amount entered on Line 34.

b. In its latest Form 393 filing, Operator incorrectly calculated the Inflation Adjustment Factor (Form 393, Part II, Worksheet 1, Line 127). Lines 122 and 125 of Form 393 require the operator to enter Gross National Product Price Index ("GNP-PI") data for the latest quarter for which data is available that ended before the date through which the Inflation Adjustment Factor is calculated. On its most recent Form 393, Operator calculated the Inflation Adjustment Factor through January 1994. However, Operator completed Lines 122 and 125 using GNP-PI data (released by the U.S. Department of Commerce on August 31, 1993) for the second quarter of 1993, rather than the fourth quarter of 1993. Operator's calculation of the Inflation Adjustment Factor is therefore incorrect.

We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available in accordance with the Form 393 Instructions.[13] On July 29, 1994, the Department of Commerce released corrected inflation data including GNP-PI figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor of 1.037 through January 1994, the base date Operator used in justifying its rates.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $13.03 per month (plus franchise fee) for the period from February 28, 1994 to May 14, 1994.[14]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the franchise area referenced in the caption, and all other complaints in this franchise area related to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the franchise area referenced in the caption that portion of the amount paid for cable programming service for the period from February 28, 1994[15] to May 14, 1994 which exceeded the maximum price of $13.03 per month (plus franchise fee), plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the franchise area referenced in the caption, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price of $13.03 (plus franchise fee).[16]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

12. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Operator shall not be required to obtain advance approval of adjustments to its CPS price in the franchise area referenced in the caption for one year following the release of this Order, due to Operator's having submitted in good faith an optional supplemental filing in response to our *Public Notice*.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[13] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[14] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[16] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

CS Docket No. 95-143

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Greensburg, Pennsylvania
in the Pittsburgh, Pennsylvania
Television Market

NOTICE OF PROPOSED RULE MAKING

Adopted: August 30, 1995; Released: September 8, 1995

Comment Date: October 31, 1995
Reply Comment Date: November 15, 1995

By the Deputy Chief, Cable Services Bureau:

1. Before the Commission is a petition for rule making filed by Cornerstone Television, Inc., the licensee of television station WPCB(TV), Channel 40, Greensburg, Pennsylvania, to amend Section 76.51 of the Commission's Rules[1] to add the community of Greensburg, Pennsylvania to the Pittsburgh, Pennsylvania television market.[2]

BACKGROUND

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of compulsory copyright license liability for cable operators.[3] Certain cable television syndicated exclusivity and network nonduplication rights are also determined by the presence of broadcast station communities of license on this list.[4] Some markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities.[5] Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support.[6]

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."[7]

4. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992,[8] which added Section 614 to the Communications Act of 1934,[9] requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules. The Commission stated that where sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole, such cases will be considered under an expedited rulemaking procedure consisting of the issuance of a Notice of Proposed Rule Making based on the submitted petition.[10]

THE PETITION

5. According to the petitioner, Greensburg is located approximately 25.9 miles from Pittsburgh. Petitioner also states that WPCB(TV)'s tower is located only 12 miles from Pittsburgh and, therefore, should not be considered a distant signal. Greensburg is said to be located in Westmoreland County, which is one of the counties in the Arbitron ADI, and one of the counties that make up the Metro Survey Area according to Arbitron. Greensburg is said to have common economic, social and cultural interests between the residents in these areas. A map of WPCB(TV)'s

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[1] 47 C.F.R. §76.51.

[2] *See* Report and Order in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2977-78, n.150 (1993).

[3] *See* 47 C.F.R. §76.658(m) and 17 U.S.C. §111(f). With passage of the Satellite Home Viewer Act of 1994, P.L. 103-369, 108 Stat. 3477 (1994) local signal copyright liability is now accorded stations throughout their mandatory cable carriage area, that is, throughout the "area of dominant influence" or ADI of the market to which the station is assigned. Although this generally reduces the importance of the Section 76.51 market list as a determinator of copyright liability, there remain situations where the list determines liability, i.e., where the 35-mile zones associated with the Section 76.51 list extend outside of the ADI of the market.

[4] See 47 C.F.R. Part 76, Subpart F.

[5] *See CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974).

[6] *See Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

[7] *See, e.g., TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), *citing Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). *See, also, Press Broadcasting Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

[8] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[9] 47 U.S.C. §614.

[10] "Requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals." *See Report and Order* in MM Docket 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd at 2977-78, n.50 (1993).

city grade, Grade A and Grade B contours is attached indicating that its city grade signal completely encompass both Greensburg and Pittsburgh.

6. Petitioner further states that, although WPCB(TV) is competitive with the other market-area stations, it is disadvantaged in this competition by having to compete with other stations in the market without comparable cable television carriage rights. Although it is entitled to carriage on area cable systems by virtue of its inclusion in the Pittsburgh ADI,[11] because Greensburg is not a designated community in the Section 76.51 market listings, it is considered a "distant signal" for purposes of compulsory copyright license liability if carried on certain cable systems in the ADI. As a result, petitioner states, they face additional copyright fees attendant to its carriage as a "distant signal." The principal benefits of the requested change, however, is said to be parity among market stations under Section 73.658(m) of the Commission's rules (territorial exclusivity rules) and to benefit the public "by access to WPCB(TV)'s independent religious/family station, seeking to provide wholesome programming to its viewers not currently available in the market."

DISCUSSION

7. Based on the facts presented, we believe that a sufficient case for redesignation of the subject market has been set forth so that this proposal should be tested through the rule making process, including the comments of interested parties. It appears from the information before us that the television stations licensed to Pittsburgh and Greensburg do compete for audiences and advertisers throughout much of the proposed combined market area and that sufficient evidence has been presented tending to demonstrate commonality between the proposed communities to be added to the market designation and the market as a whole. Moreover, the petitioners' proposal appears to be consistent with the Commission's policies regarding redesignation of a hyphenated television market. Accordingly, comment is requested on the proposed addition of Greensburg to the Pittsburgh television market.

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

8. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

9. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **October 31, 1995** and reply comments on or before **November 15, 1995**. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

10. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601 (3) of the Regulatory Flexibility Act. A few cable television system operators will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Additional Information

11. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules. For additional information on this proceeding, contact William H. Johnson (202) 416-0800.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[11] *See* Section 76.56(b) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-25

In the Matter of

Amendment of Section 73.202(b),	RM-8588
Table of Allotments,	RM-8633
FM Broadcast Stations.	
(Waldport and Depoe Bay, Oregon)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 31, 1995; Released: September 8, 1995

By the Chief, Allocations Branch:

1. At the request of Jarvis Communications, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 10 FCC Rcd 2099 (1995), proposing the allotment of Channel 288A to Waldport, Oregon, as the community's first local FM broadcast service. Petitioner filed comments and reply comments supporting the allotment at Waldport.[2] Ginna Jones ("Jones") filed a counterproposal requesting the allotment of Channel 288A to Depoe Bay, Oregon, as well as reply comments.[3]

2. Jones requests the allotment of Channel 288A to Depoe Bay as the community's first local aural broadcast service and states her intention to apply for the channel, if allotted. She submits that Depoe Bay is an incorporated city with its own chamber of commerce, city hall, fire department, post office, cable television service, bank, medical clinic and Coast Guard station. In addition, she notes that Depoe Bay is home to many antique shops, book store, gift shops, grocery stores, craft/artist galleries, clothing stores, hotel, motel and bed and breakfast accommodations, restaurants, TV campgrounds and charter boats. Finally, she states that Channel 288A can be allotted to Depoe Bay in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.

3. Petitioner opposes the allotment of Channel 288A to Depoe Bay stating that the community is already well served as it is in "close proximity" to seven operating stations. In response, Jones again points out that Depoe Bay has no local transmission service while Waldport does.

4. Based on the record before us, we believe the public interest would be served by allotting Channel 288A to Depoe Bay since it could provide the community with its first local FM broadcast service. Channel 288A can be allotted to Depoe Bay in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[4] We note that this allotment is short-spaced to the present operation of Station KFAT, Channel 291C, Corvallis, Oregon. However, Station KFAT's license has been modified to specify operation on Channel 292C pursuant to the *Report and Order* in MM Docket No. 87-523. *See* 4 FCC Rcd 839 (1988). Therefore, final licensing of a Depoe Bay station on Channel 288A may be withheld pending the licensing of Station KFAT on Channel 292C.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 23, 1995,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Depoe Bay, Oregon	288A

6. The window period for filing applications will open on **October 23, 1995,** and close on **November 24, 1995.**

7. IT IS FURTHER ORDERED, That the petition for rule making filed by Jarvis Communications, Inc. (RM-8588), IS DISMISSED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

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[1] The community of Depoe Bay has been added to the caption.

[2] Petitioner's comments reiterating its support of the Waldport allotment are late-filed. Upon discovering that the Commission had no record of its initial comments, petitioner submitted a letter on May 23,1995, to which it appends a letter dated March 6, 1995, which states its intention to apply for the Waldport channel. Although the March 6 letter bears the correct Commission address, petitioner states that it was not sent registered and thus has no record of its delivery and receipt. The Commission's policy is to refuse to accept a late-filed expression of interest, unless the proceeding is uncontested. *See Santa Isabel, Puerto Rico*, 51 FR 6119 (1986), *aff'd*, 2 FCC Rcd 3454 (1987), *aff'd*. 3 FCC Rcd 2236 (1988), *aff'd*, 918 F. 2d 960 (D.C. Cir. 1990). Here, the proceeding is contested as there are no alternate channels which can be allotted to either community and we find that petitioner has provided insufficient reason to compel acceptance of its comments. We have accepted petitioner's timely filed reply comments as comments in opposition to the Depoe Bay allotment.

Even if we were to accept petitioner's late-filed comments and consider the competing requests on their relative merits, we would not allot the channel to Waldport since it already has a local aural broadcast service, AM Station KORC, thus falling under the fourth allotment priority, other public interest matters, while Depoe Bay has no such service, thus falling under the third allotment priority, provision of a first local aural service. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). Further, a staff engineering study has determined that both Waldport and Depoe Bay receive full-time FM service from the same eleven stations.

[3] Public Notice of the filing of the counterproposal was given on April 27, 1995, Report No. 2068.

[4] The coordinates for Channel 288A at Depoe Bay are 44-48-42 North Latitude and 124-03-42 West Longitude.

FEDERAL COMMUNICATIONS COMMISSION

John A Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T CORP.

Application for authority to acquire and operate facilities for direct service between the United States and Mongolia.	File No. I-T-C-95-361
Application for authority to acquire and operate capacity in the Marseille/Palermo Link, and to convey capacity in the Marseille/Palermo Link, and TAT-8 and TAT-9 Cable Systems.	File No. I-T-C-95-364
Application for authority to acquire and operate facilities for direct service between the United States and Afghanistan.	File No. I-T-C-95-366
Application for authority to acquire and operate facilities in the ODIN Cable System.	File No. I-T-C-95-418

MEMORANDUM OPINION, ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 30, 1995 **Released: September 8, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested applications,[1] filed by AT&T Corp. (AT&T) pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-95-361, I-T-C-95-364, I-T-C-95-366 and I-T-C-95-418 ARE GRANTED, and AT&T is authorized to:

a. lease from KDD and operate six 64-kbps voice-grade circuits between an appropriate earth station in Japan and an appropriate INTELSAT satellite over the Indian Ocean, connecting with similar circuits between the satellite and an earth station in Mongolia, furnished by its correspondent;

b. lease a one-half interest in and operate any necessary overseas connecting facilities; and

c. use the facilities in a and b, above, in conjunction with previously authorized facilities in the TPC-4 Cable System, to provide its regularly authorized services between the United States and Mongolia.

d. acquire on an Indefeasible Right of User (IRU) basis a one-half interest in and operate 330 MAUOs[2] of capacity in the Marseille/Palermo Link;

e. acquire by lease or other comparable means any necessary overseas connecting facilities; and

f. use the facilities in d and e, above, to provide its regularly authorized services between the United States, on the one hand, and Israel (120 MAUOs), Greece (30 MAUOs), and Turkey (60 MAUOs), on the other hand

g. convey on an IRU basis to MCI, Inc. and IDB WorldCom Services Inc., respectively, a one-half interest in 60 MAUOs of capacity in the Marseille/Palermo Link; and

h. convey to MCI, Inc. on an IRU basis a one-half interest in 30 MAUOs of capacity in the TAT-8 Cable System between Tuckerton, New Jersey and Widemouth, England and 30 MAUOs of capacity in the TAT-9 Cable System between Manahawkin, New Jersey and St. Hilaire, France.

i. lease from Comsat and operate 30 64-kbps voice-grade circuits between the Coram, New York earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Afghanistan, furnished by its correspondent;

j. own and operate facilities in the Coram, New York earth station, to be used in conjunction with the space segment capacity; and

k. use the facilities in i, j and k, above, to provide AT&T's regularly authorized services between the United States and Afghanistan.

l. acquire on an ownership basis a one-half interest in and operate capacity in the ODIN Cable System as follows:

Segment	No. of half-MIUs[3]
Netherlands-Denmark	78
Denmark-Norway	37
Norway-Sweden	30

m. acquire by lease or other comparable means any necessary overseas connecting facilities; and

n. use the facilities in l and m, above, to provide AT&T's regularly authorized services between the United States, on the one hand, and the Netherlands, Denmark, Norway and Sweden, on the other hand.

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[1] Petitions to Deny all four applications were filed by Telefonica Larga Distancia de Puerto Rico (TLD). AT&T filed oppositions and TLD replied. By letter of August 17, 1995, TLD withdrew all four of its petitions to deny the applications.

[2] A MAUO is a minimum assignable unit of ownership, which is a 64-kbps circuit equivalent.

[3] A MIU is the minimum assignable unit of ownership in the ODIN Cable System. A MIU is equivalent to 30 MAUOs.

3. IT IS FURTHER ORDERED that the applicant shall obtain any necessary operating arrangements in each of the countries to which it provides service and shall file with the Commission any operating agreements with its correspondents within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

6. IT IS FURTHER ORDERED that the authority granted herein is subject to any action the Commission may take in its Notice of Proposed Rulemaking, IB Docket No. 95-22, 10 FCC Rcd 4844 (1995).

7. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GLOBALCOM INTERNATIONAL, INC.

Application for authority to acquire and operate facilities for service to various overseas points. File No. I-T-C-95-403

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 30, 1995; Released: September 8, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a partial grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-403 IS GRANTED IN PART, and Globalcom International, Inc. (Globalcom) is authorized to:

a. provide international switched services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1, 2, 4 and 12, MCI's Tariff FCC No. 1, MCI/OTI's Tariff FCC No. 1, MCI/WUI's Tariff FCC No. 27, Sprint's Tariff FCC No. 1, LCI's Tariff FCC No. 1, LDDS' Tariff FCC No. 1, C&W's Tariff FCC No. 3, RCI's Tariff FCC No. 2, Allnet's Tariff FCC No. 5 and WilTel's Tariffs FCC Nos. 2 and 5, between the United States and the points listed in those tariffs;

b. lease and operate three E1 circuits between the United States and the border of Canada for provision of private line service interconnected with the public switched network between the United States and Canada;

c. lease and operate three E1 circuits between the United States and the United Kingdom for the provision of private line service interconnected with the public switched network between the United States and the United Kingdom;

d. acquire on an Indefeasible Right of User basis a one-half interest in and operate the numbers of cable circuits listed in Appendix A, for provision of international services between the United States and those points;

e. establish channels of communication between appropriately licensed U.S. earth stations and INTELSAT satellites, for provision of Intelsat Business Services (IBS), International Television Service and Datanet Service between the United States and the international points listed in Comsat's tariffs for the space segment of these services;

f. lease from Comsat and operate the satellite circuits specified in Appendix B, between appropriately licensed U.S. earth stations and INTELSAT Atlantic and Pacific Ocean Region satellites, connecting with similar facilities between the satellites and the overseas points listed in Appendix B, furnished by its correspondents;

g. lease from Orion Satellite Corporation (Orion) and operate the satellite circuits specified in Appendix C, between appropriately licensed U.S. earth stations and the Orion F1 satellite, connecting with similar circuits between the satellite and the overseas points listed in Appendix C, furnished by its correspondents;

h. lease from PanAmerican Satellite Corp. (PAS) and operate the satellite circuits specified in Appendix D, between appropriately licensed U.S. earth stations and the PAS-1, PAS-2 and PAS-4 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix D, furnished by its correspondents;

i. lease from the Columbia/TDRSS International Satellite System (TDRSS) and operate the satellite circuits specified in Appendix E, between appropriately licensed U.S. earth stations and the TDRS-41 and TDRS-174 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix E, furnished by its correspondents;

j. establish channels of communications between appropriately licensed U.S. earth stations and U.S. domestic satellites (Anik satellites for service to Canada, and Mexican domestic satellites for service to Mexico), for provision of authorized transborder services between the United States and the points listed in Appendix F;

k. lease and operate any necessary domestic connecting facilities;

l. lease a one-half interest in and operate any necessary overseas connecting facilities.

m. use the facilities in f, g, h, i, k, and l, above, to provide regularly authorized services, including switched voice and data and private line services, between the United States and the points listed in the Appendices.

3. IT IS FURTHER ORDERED that neither Globalcom nor any persons or companies directly or indirectly controlling or controlled by Globalcom, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Globalcom or any persons or companies controlling or controlled by Globalcom are parties.

4. IT IS FURTHER ORDERED that our authorization of Globalcom to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the countries listed in the Appendices – that is, private lines which originate in the United States and terminate in one of the countries listed in the Appendices or which originate in one of the countries listed in the Appendices and terminate

in the United States. In addition, Globalcom may not -- and Globalcom's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched basic services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1994), *petition for reconsideration pending*.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for any additional circuits it seeks to operate via the NPC, Canus-1 or PTAT-1 Cable System, or via the PAS-1, PAS-2, PAS-4, TDRS-41, TDRS-164 or Orion F1 satellites.

11. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement.

12. IT IS FURTHER ORDERED that action on the applicant's request to acquire Morelos and Solidaridad circuits to countries in addition to Mexico is hereby DEFERRED pending the outcome of the Notice of Proposed Rulemaking in *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems*, IB Docket No. 95-41, FCC 95-146, released April 25, 1995.

13. IT IS FURTHER ORDERED that the authorization to resell international private lines for the provision of switched services an interconnected private line services between the United States and Canada, and/or the United Kingdom, is conditioned upon Canada and/or the United Kingdom continuing to afford resale opportunities equivalent to those available under U.S. law.

14. IT IS FURTHER ORDERED that Globalcom is required to file with the Commission on a semi-annual basis the information contained in the annual traffic reports required by Section 43.61 of the Commission's Rules. This reporting requirement applies to traffic carried through December 1995 for Canada, and December 1997 for the United Kingdom. These semi-annual reports shall be filed with the Commission not later than September 30 for the first six-month calendar period, and March 31 for the second six-month calendar period.

15. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

APPENDIX A

CABLE SYSTEM	CAPACITY REQUESTED	COUNTRIES/AREAS TO BE SERVED
NPC	Three (3) E-1 channels	Japan
Aloha	Three (3) E-1 channels	Hawaii
CANUS-1	Three (3) E-1 channels	Canada
PTAT-1	Three (3) E-1 channels	U.K., Ireland, Bermuda

APPENDIX B

COUNTRIES TO BE SERVED VIA INTELSAT

Country	Circuits	Country	Circuits	Country	Circuits
Argentina	80	Haiti	80	Poland	80
Australia	80	Honduras	80	Portugal	80
Austria	80	India	80	Romania	80
Bahamas	80	Indonesia	80	Saudi Arabia	80
Barbados	80	Iran	80	Senegal	80
Belgium	80	Ireland	80	Singapore	80
Bolivia	80	Israel	80	Somalia	80
Brazil	80	Italy	80	South Africa	80
Canada	80	Jamaica	80	Spain	80
Czech Republic	80	Japan	80	Sweden	80
		Jordan	80	Switzerland	80
Chile	80	Kenya	80	Syria	80
China, People's Republic	80	Korea, Republic of	80	Taiwan	80
				Thailand	80
Croatia	80	Kuwait	80	Trinidad & Tobago	80
Denmark	80	Lebanon	80		
Dominican Republic	80	Liechtenstein	80	Uganda	80
Ecuador	80	Luxembourg	80	United Arab Emirates	80
Egypt	80	Malaysia	80		
El Salvador	80	Mexico	80	United Kingdom	80
Ethiopia	80	Morocco	80		
Finland	80	Netherlands	80	Uruguay	80
France	80	Netherlands Antilles	80	Vietnam	80
Guantanamo Bay	80			Venezuela	80
Germany, Federal Republic of	80	New Zealand	80	Slovenia	80
		Nicaragua	80	Zaire	80
Ghana	80	Norway	80	Macedonia, FYRO	80
Greece	80	Panama	80		
Guatemala	80	Peru	80		
Guinea	80	Philippines	80		
Bosnia-Herzegovenia	80				
Serbia & Montenegro	80				

APPENDIX C

COUNTRIES TO BE SERVED VIA ORION SATELLITE CORPORATION'S F1 SATELLITE (INTERCONNECTED)

Up to six 64-Kbps voice-grade circuits between the United States and the countries listed below:

Germany
Ireland
The Netherlands
Poland
Sweden

COUNTRIES TO BE SERVED VIA ORION SATELLITE CORPORATION'S F1 SATELLITE (NON-INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and the countries listed below:

Austria
Belgium
Denmark
France
Germany
Ireland
Italy
Luxembourg
Norway
Poland
Serbia & Montenegro
Sweden
The Netherlands
United Kingdom

APPENDIX D

COUNTRIES TO BE SERVED VIA PAS-1 (NOT INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and the countries listed below:

Ku-band Countries

Anguilla
Austria
Azerbaijan
Bahamas
Belgium
Bermuda
Bosnia-Herzegovina
British Virgin Is.
Cayman Islands
Croatia
Czech Republic
Denmark
France
Germany
Greece
Ireland
Italy
Luxembourg
Monaco
Macedonia, FYRO
Montserrat
Netherlands
Portugal
Romania
Russian Federation
Serbia & Montenegro
Slovenia
Spain
Sweden
Switzerland
Turks & Caicos Is.
United Kingdom

C-band Countries:

Anguilla
Argentina
Aruba
Bahamas
Barbados
Bermuda
Bolivia
Brazil
British Virgin Is.
Cayman Islands
Chile
Colombia
Costa Rica
Dominican Rep.
Ecuador
Guatemala
Haiti
Honduras
Jamaica
Mexico
Montserrat
Netherlands Antilles
Panama
Paraguay
Peru
Trinidad and Tobago
Turks & Caicos Is.
Uruguay
Venezuela

COUNTRIES TO BE SERVED VIA PAS-1 (INTERCONNECTED)

Up to six 64-Kbps voice-grade circuits between the United States and the countries listed below:

Ku-band Countries:

Azerbaijan
Bahamas
Bosnia-Herzegovina
Czech Republic
Portugal
Romania
Russian Federation
Serbia & Montenegro
United Kingdom

C-Band Countries:

Bahamas
Costa Rica
Dominican Republic
Netherlands Antilles
Panama
Peru

COUNTRIES TO BE SERVED VIA PAS-2 (NON-INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and the following country:

United Kingdom

COUNTRIES TO BE SERVED VIA PAS-2 (INTERCONNECTED)

Up to six 64-Kbps voice-grade circuits between the United States and the following country:

United Kingdom

COUNTRIES TO BE SERVED VIA PAS-4 (NON-INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and the following countries:

Australia
Hong Kong
New Zealand

COUNTRIES TO BE SERVED VIA PAS-4 (INTERCONNECTED)

Up to six 64-Kbps voice-grade circuits between the United States and the following countries:

Australia
Hong Kong
New Zealand

APPENDIX E

COUNTRIES TO BE SERVED VIA COLUMBIA'S TDRSS (NON-INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and the countries listed below:

TDRSS-41	TDRSS-174
Austria	Hong Kong
Bahamas	Japan
Belgium	Mexico
Bosnia-Herzegovina	Philippines
Canada	Republic of Korea
Denmark	
Finland	
France	
Germany	
Ireland	
Israel	
Jamaica	
Liechtenstein	
Luxembourg	
Mexico	
Netherlands	
Portugal	
Serbia & Montenegro	
Sweden	
Switzerland	
Turkey	
United Kingdom	

COUNTRIES TO BE SERVED VIA TDRSS (INTERCONNECTED)

Up to six 64-Kbps voice-grade circuits between the United States and the countries listed below:

TDRS-41	TDRS-174
Germany	Hong Kong
Bosnia-Herzegovina	
Serbia & Montenegro	
United Kingdom	

APPENDIX F

COUNTRIES TO BE SERVED VIA AUTHORIZED U.S. DOMESTIC SATELLITES, MEXICAN MORELOS (AND SOLIDARIDAD) SATELLITES, AND ANIK SATELLITES

Anguilla	Domestic Satellites
Antigua and Barbuda	Domestic Satellites
Argentina	Domestic Satellites
Bahamas	Domestic Satellites
Barbados	Domestic Satellites
Belize	Domestic Satellites
Bermuda	Domestic Satellites
Bolivia	Domestic Satellites
Brazil	Domestic Satellites
British Virgin Islands	Domestic Satellites
Canada	Domestic Satellites, ANIK
Cayman Island	Domestic Satellites
Chile	Domestic Satellites
Columbia	Domestic Satellites
Dominica	Domestic Satellites
Ecuador	Domestic Satellites
El Salvador	Domestic Satellites,
French Guiana	Domestic Satellites
Grenada	Domestic Satellites
Grenadines	Domestic Satellites
Guyana	Domestic Satellites
Guatemala	Domestic Satellite
Honduras	Domestic Satellites
Mexico	Domestic Satellites, Morelos and Solidaridad
Montserrat	Domestic Satellites
Netherlands Antilles	Domestic Satellites
Nicaragua	Domestic Satellites
Panama	Domestic Satellites,
Paraguay	Domestic Satellites
Peru	Domestic Satellites
St. Kitts & Nevis	Domestic Satellites
St. Lucia	Domestic Satellites
St. Vincent	Domestic Satellites
Suriname	Domestic Satellites
Turks & Caicos	Domestic Satellites
Uruguay	Domestic Satellites
Venezuela	Domestic Satellites

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BUSINESS TELECOM, INC.

Application for authority to acquire and operate facilities for service to various overseas points. File No. I-T-C-95-404

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 30, 1995; Released: September 8, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a partial grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-404 IS GRANTED, and Business Telecom, Inc. (BTI) is authorized to:

a. establish channels of communication between appropriately licensed U.S. earth stations and INTELSAT satellites, for provision of Intelsat Business Services (IBS), International Television Service and Datanet Service between the United States and the international points listed in Comsat's tariffs for the space segment of these services;

b. lease from Comsat and operate the satellite circuits specified in Appendix A, between appropriately licensed U.S. earth stations and INTELSAT Atlantic and Pacific Ocean Region satellites, connecting with similar facilities between the satellites and the overseas points listed in Appendix A, furnished by its correspondents;

c. lease from PanAmerican Satellite Corp. (PAS) and operate the satellite circuits specified in Appendix B, between appropriately licensed U.S. earth stations and the PAS-1, PAS-2 and PAS-4 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix B, furnished by its correspondents;

d. lease from the Columbia/TDRSS International Satellite System (TDRSS) and operate the satellite circuits specified in Appendix C, between appropriately licensed U.S. earth stations and the TDRS-41 and TDRS-174 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix C, furnished by its correspondents;

e. lease from Orion Satellite Corporation (Orion) and operate the satellite circuits specified in Appendix D, between appropriately licensed U.S. earth stations and the Orion F1 satellite, connecting with similar circuits between the satellite and the overseas points listed in Appendix D, furnished by its correspondents;

f. establish channels of communication between appropriately licensed U.S. earth stations and U.S. domestic satellites (also Anik satellites for service to Canada, and Mexican domestic satellites for service to Mexico), for provision of authorized transborder services between the United States and the points listed in Appendix E;

g. lease and operate any necessary domestic connecting facilities;

h. lease a one-half interest in and operate any necessary overseas connecting facilities; and

i. use the facilities in b, c, d and e, above, to provide regularly authorized services, including switched voice and data and private line services, between the United States and the points listed in the Appendices.

3. IT IS FURTHER ORDERED that neither BTI nor any persons or companies directly or indirectly controlling or controlled by BTI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which BTI or any persons or companies controlling or controlled by BTI are parties.

4. IT IS FURTHER ORDERED that our authorization of BTI to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the countries listed in the Appendices -- that is, private lines which originate in the United States and terminate in one of the countries listed in the Appendices or which originate in one of the countries listed in the Appendices and terminate in the United States. In addition, BTI may not -- and BTI's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched basic services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1994), *petition for reconsideration pending.*

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for any additional circuits it seeks to operate via the PAS-1, PAS-2, PAS-4, TDRS-41, TDRS-174, or Orion F1 satellites.

11. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement. $12. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

APPENDIX A

COUNTRIES TO BE SERVED VIA INTELSAT

Country	Circuits	Country	Circuits	Country	Circuits
Argentina	50	Guatemala	50	Panama	50
Australia	50	Guinea	50	Peru	50
Austria	50	Haiti	50	Philippines	50
		Honduras	50	Poland	50
Bahamas	50	India	50	Portugal	50
Barbados	50	Indonesia	50	Romania	50
Belgium	50	Iran	50		
Bolivia	50	Ireland	50	Saudi Arabia	50
Bosnia-Herzegovina	50	Israel	50	Senegal	50
Brazil	50	Italy	50	Serbia &	
Canada	50	Jamaica	50	Montenegro	50
Czech Republic	50	Japan	50	Singapore	50
Chile	50	Jordan	50	Slovenia	50
China, People's	50	Kenya	50	Somalia	50
Republic		Korea,	50	South Africa	50
Croatia	50	Republic of		Spain	50
Denmark	50	Kuwait	50	Sweden	50
Dominican	50	Lebanon	50	Switzerland	50
Republic		Liechtenstein	50	Syria	50
Ecuador	50	Luxembourg	50	Taiwan	50
Egypt	50	Macedonia, FYRO	50	Thailand	50
El Salvador	50	Malaysia	50	Trinidad & Tobago	50
Ethiopia	50	Mexico	50	Uganda	50
Finland	50	Morocco	50	United Arab	50
France	50	Netherlands	50	Emirates	
		Netherlands	50	United Kingdom	50
Germany, Federal	50	Antilles		Uruguay	50
Republic of		New Zealand	50	Vietnam	50
Ghana	50	Nicaragua	50	Venezuela	50
Greece	50	Norway	50	Zaire	50
Guantanamo Bay	50				

APPENDIX B

COUNTRIES TO BE SERVED VIA PAS-1 (NOT INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and the countries listed below:

Ku-band Countries

Anguilla
Austria
Azerbaijan
Bahamas
Belgium
Bermuda
Bosnia-Herzegovina
British Virgin Is.
Cayman Islands
Croatia
Czech Republic
Denmark
France
Germany
Greece
Irelan d
Italy
Luxembourg
Monaco
Macedonia, FYRO
Montserrat
Netherlands
Portugal
Romania
Russian Federation
Serbia & Montenegro
Slovenia
Spain
Sweden
Switzerland
Turks & Caicos Is.
United Kingdom

C-band Countries

Anguilla
Argentina
Aruba
Bahamas
Barbados
Bermuda
Bolivia
Brazil
British Virgin Is.
Cayman Islands
Chile
Colombia
Costa Rica
Dominican Rep.
Ecuador
Guatemala
Haiti
Honduras
Jamaica
Mexico
Montserrat
Netherlands Antilles
Panama
Paraguay
Peru
Trinidad and Tobago
Turks & Caicos Is.
Uruguay
Venezuela

COUNTRIES TO BE SERVED VIA PAS-1 (INTERCONNECTED)

Up to six 64-Kbps voice-grade circuits between the United States and the countries listed below:

Ku-band Countries:

Azerbaijan
Bahamas
Bosnia-Herzegovina
Czech Republic
Portugal
Romania
Russian Federation
Serbia & Montenegro
United Kingdom

C-Band Countries:

Bahamas
Costa Rica
Dominican Republic
Netherlands Antilles
Panama
Peru

COUNTRIES TO BE SERVED VIA PAS-2 (NON-INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and the country listed below:

United Kingdom

COUNTRIES TO BE SERVED VIA PAS-2 (INTERCONNECTED)

Up to six 64-Kbps voice-grade circuits between the United States and the country listed below:

United Kingdom

COUNTRIES TO BE SERVED VIA PAS-4 (NON-INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and the countries listed below:

Australia
Hong Kong
New Zealand

COUNTRIES TO BE SERVED VIA PAS-4 (INTERCONNECTED)

Up to six 64-Kbps voice-grade circuits between the United States and the countries listed below:

Australia
Hong Kong
New Zealand

APPENDIX C

COUNTRIES TO BE SERVED VIA COLUMBIA'S TDRSS (NON-INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and the countries listed below:

TDRSS-41	TDRSS-174
Austria	Hong Kong
Bahamas	Japan
Belgium	Mexico
Bosnia-Herzegovina	Philippines
Canada	Republic of Korea
Denmark	
Finland	
France	
Germany	
Ireland	
Israel	
Jamaica	
Liechtenstein	
Luxembourg	
Mexico	
Netherlands	
Portugal	
Serbia & Montenegro	
Sweden	
Switzerland	
Turkey	
United Kingdom	

COUNTRIES TO BE SERVED VIA TDRSS (INTERCONNECTED)

Up to six 64-Kbps voice-grade circuits between the United States and the countries listed below:

TDRS-41	TDRS-174
Germany	Hong Kong
Bosnia-Herzegovina	
Serbia & Montenegro	
United Kingdom	

APPENDIX D

COUNTRIES TO BE SERVED VIA ORION SATELLITE CORPORATION'S F1 SATELLITE (INTERCONNECTED)

Up to six 64-Kbps voice-grade circuits between the United States and the countries listed below:

Germany
Ireland
The Netherlands
Poland
Sweden

COUNTRIES TO BE SERVED VIA ORION SATELLITE CORPORATION'S F1 SATELLITE (NON-INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and the countries listed below:

Austria	Norway
Belgium	Poland
Denmark	Serbia & Montenegro
France	Sweden
Germany	The Netherlands
Ireland	United Kingdom
Italy	
Luxembourg	

APPENDIX E

COUNTRIES TO BE SERVED VIA AUTHORIZED U.S. DOMESTIC SATELLITES, MEXICAN MORELOS AND SOLIDARIDAD SATELLITES, AND ANIK SATELLITES

Anguilla	Domestic Satellites
Antigua and Barbuda	Domestic Satellites
Bahamas	Domestic Satellites
Barbados	Domestic Satellites
Belize	Domestic Satellites
Bermuda	Domestic Satellites
British Virgin Islands	Domestic Satellites
Canada	Domestic Satellites, ANIK
Cayman Island	Domestic Satellites
Dominica	Domestic Satellites
Grenada	Domestic Satellites
Grenadines	Domestic Satellites
Mexico	Domestic Satellites, Morelos and Solidaridad
Montserrat	Domestic Satellites
Netherlands Antilles	Domestic Satellites
St. Kitts & Nevis	Domestic Satellites
St. Lucia	Domestic Satellites
St. Vincent	Domestic Satellites
Turks & Caicos	Domestic Satellites
Venezuela	Domestic Satellites

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
August 29, 1995

Released: September 8, 1995

Mr. Bruce Liles
BellSouth Telecommunications, Inc.
3535 Colonnade Parkway
South Building, Room E5E1
Birmingham, Alabama 35243

Ms. Amy Hinderer
Southwestern Bell Telephone Company
1 Bell Center
Suite 3516
St. Louis, Missouri 63101

Ms. Mary Beth Banks
Sprint Corporation
1850 M Street, N.W.
11th Floor
Washington, D.C. 20036

Mr. Paul Eskildson
MCI Telecommunications Corp.
1200 South Hayes Street
Arlington, Virginia 22202

Mr. David Golden
AT&T Corporation
295 N. Maple Avenue
Room 1134L1
Basking Ridge, New Jersey 07920

Dear Messrs. Liles, Eskildson and Golden, Ms. Hinderer and Ms. Banks:

This is in response to your informal request for a staff ruling regarding the means by which common carriers may inform telephone subscribers of their rights and responsibilities with respect to interstate pay-per-call services. It is our understanding that there is a high level of awareness regarding these rules, such as the ability of telephone subscribers to block access to 900 number services. This is demonstrated when, as problems arise in other areas, subscribers cite this ability to block access for this category of service.

Section 64.1509(b)(2)(iv) of the Commission's rules requires common carriers that transmit and bill pay-per-call services to disseminate consumer education information to all subscribers at least once per calendar year, at intervals of not less than six months or more than 18 months. That section does not specify a particular method by which carriers must disseminate the annual consumer education information. You report that virtually all carriers have chosen to make these notifications through inserts to monthly telephone bills, but that many carriers now wish to accomplish annual notification by publishing pay-per-call information in local telephone directories. Shortly after you filed your request the staff informally stated that it had no objection to this type of annual notification, but you request a written ruling.

Such a ruling would not change the level of protection enjoyed by telephone subscribers. Subscribers would continue to have the right, for example, to choose to block access to all 900 number services at no charge when they sign up for new telephone service. These new customers will receive information outlining their rights when they sign up and have 60 days in which to make a decision. After that time these customers, as may all telephone subscribers, can elect to block these services for a reasonable fee. Moreover, Section 64.1510(a)(2) of the rules requires carriers to provide a statement of subscribers' rights on each bill that includes charges for an interstate pay-per-call service.

The Commission adopted the annual disclosure requirement on its own motion to ensure that telephone subscribers receive the information necessary to make informed choices about use of and payment for pay-per-call services. This requirement supplements the statutory requirement that carriers provide consumer information when they bill for such services. It is our opinion that your suggestion is consistent with our goal that consumers be fully informed about their rights regarding pay-per-call services. Including such information in a telephone directory along with other reference information can be a valuable resource for consumers. Thus, we see no impediment to your plans to satisfy the annual notification requirement through disclosures in local telephone directories, as long as the directories are delivered to all subscribers at the required time intervals. We agree that consumers are already aware that a variety of important information regarding telephone services may be found at the beginning of local telephone directories and that consumers are far more likely to retain a telephone directory than a bill insert.

I trust that the foregoing information is responsive to your request. If you have any questions about this matter, please contact myself or Robert W. Spangler (418-0700) or Mary Romano (418-0960).

Sincerely,

John B. Muleta
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Alascom, Inc., Cost Allocation
Plan for the Separation of Bush
and Non-Bush Costs

ORDER

Adopted: August 31, 1995; Released: September 11, 1995

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In a Memorandum Opinion and Order (*"MO&O"*) released on May 24, 1994,[1] the Commission adopted a plan to implement a new market structure designed to increase competition in telecommunications services to and from Alaska. As part of this plan, the Commission required, among other things, that Alascom, Inc. ("Alascom") develop a cost allocation plan to apportion its costs between locations where Alascom faces competition and locations where Alascom has a facilities monopoly. The plan requires that the costs of providing service to each type of facility be defined pursuant to a cost allocation plan ("CAP") developed by Alascom and subject to Commission approval.[2] The Commission delegated to the Chief, Common Carrier Bureau ("Bureau"), authority to review Alascom's CAP and, based on the Bureau's analysis and consideration of public comment, to require revisions if necessary.[3]

2. On August 29, 1994, Alascom filed its CAP as required by the *MO&O*. On September 12, 1994, the Bureau solicited public comment on the Alascom CAP.[4] On May 4, 1995 the Bureau found Alascom's CAP deficient in two respects: (1) it did not provide enough information to determine how Alascom intends to allocate its costs between Bush and non-Bush activities[5] and (2) it did not comply with the Commission's cost allocation rules. The Bureau therefore rejected the proposed CAP and required Alascom to submit a revised plan within sixty days.[6] On July 3, 1995, Alascom filed its revised plan as required by the *Cap Rejection Order* and, on July 14, 1995, the Bureau solicited public comment on Alascom's revised CAP.[7] Comments were filed by GCI and a reply was filed by Alascom. In this order we conclude that Alascom's CAP provides sufficient explanations of its methodologies for direct assignment, for direct attribution, and for allocating investment and costs to ensure that all costs are reasonably apportioned between Bush and non-Bush activities. We also conclude that Alascom complies with the Commission's cost allocation rules for allocating common investment and expense between Bush and non-Bush locations. We, therefore, approve Alascom's CAP.

II. BACKGROUND

3. Alascom and AT&T currently provide telephone service between Alaska and the other states pursuant to the Joint Services Agreement ("JSA") approved by the Commission in 1981 as part of the on-going process to achieve interstate rate integration in Alaska.[8] Rate integration is the Commission policy adopted to provide service between the lower 48 states and Alaska, Hawaii, Puerto Rico, and the Virgin Islands at rates equivalent to existing rates for comparable distances in the lower 48 states.[9] Under the JSA, Alascom and AT&T agreed to jointly provide interstate message telephone service ("MTS"), with Alascom responsible for MTS carriage to, from and within Alaska, and AT&T responsible for carriage in the lower 48 states.[10] Under the terms of the JSA, AT&T is obligated to purchase all of its services from Alascom and to pay all of Alascom's interstate MTS service costs including a return equal to

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[1] Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, 9 FCC Rcd 3023 (1994) (*MO&O*). *See also* Alaska Joint Board Final Recommended Decision, 9 FCC Rcd 2197 (Joint Board 1993) (*Final Recommended Decision*).

[2] Alascom provides interexchange services to certain small, remote villages in Alaska known as Bush communities. In this order, we refer to other locations in Alaska wherein Alascom also provides interexchange services as non-Bush.

[3] *MO&O* 9 FCC Rcd at 3033, para. 58, n.78.

[4] Comments sought on Alascom, Inc. Cost Allocation Plan, 9 FCC Rcd 3598 (1994). Comments were filed by American Telephone and Telegraph Company (AT&T), MCI Communications Corporation (MCI) and General Communications, Inc. (GCI). A reply was filed by Alascom.

[5] *See supra* note 2.

[6] *See* Alascom, Inc., Cost Allocation Plan for the Separation of Bush and Non-Bush Costs, 10 FCC Rcd 4963 (1995) (*CAP Rejection Order*).

[7] Comments sought on Alascom, Inc. Revised Cost Allocation Plan, DA 95-1535, Released July 14, 1995.

[8] *See Memorandum Opinion and Order* in W-P-C 649 *et al.*, 87 FCC 2d 25 (1981).

[9] Establishment of Domestic Communications Satellite Facilities, 35 FCC 2d 844, 856-57 (Domsat II), *aff'd on recon.*, 38 FCC 2d 665 (1972), *aff'd sub nom.* Network Project v. FCC, 511 F. 2d 786 (D.C. Cir 1975). See also Integration of Rates and Services, 61 FCC 2d 380 (1976), *recon.* in part, 65 FCC 2d 324 (1977) (extending rate integration policy to the Virgin Islands).

[10] The Commission recently granted an application from Alascom, AT&T, and Pacific Telecom to transfer control of Alascom from Pacific Telecom to AT&T. In their application, the applicants asserted that the transfer would be in conformance with the requirements of the *MO&O*. The applicants stated that they would seek no material modifications of the *MO&O* and that Alascom, under new ownership as "AT&T/Alascom," will continue to exist as a separate subsidiary of AT&T with no change in corporate, legal or regulatory status. *See In re Application of* Alascom, Inc. AT&T Corporation and Pacific Telecom, Inc. For Transfer of Control of ALASCOM, Inc. from Pacific Telecom, Inc. to AT&T Corporation and Application of Alascom, Inc. For Review of Authorization to Acquire and Operate a Fiber Optic Cable System between Alaska and Oregon for the Provision of Interstate Switched and Private Line Services, FCC 95-334 (released August 2, 1995).

AT&T's nationwide return. Under the *MO&O*, the JSA terminates on January 1, 1996, if certain conditions are met. On that date Alascom must offer its tariffed common carrier services to other interexchange carriers on a non-discriminatory basis at rates that reflect its cost of service under separate rate schedules for its Bush and non-Bush activities. These rate schedules must be supported by cost allocation studies consistent with the Commission's joint cost rules[11] and under a CAP approved by the Commission.[12]

4. The Commission's joint cost rules set forth principles defining how a carrier must allocate its common costs between its regulated and nonregulated operations.[13] In the *MO&O*, the Commission adopted the Joint Board recommendation that these same principles be applied to allocate Alascom's costs between its Bush and non-Bush operations.[14] Two joint cost rules are relevant here. The first, Section 64.901,[15] specifies that for allocation purposes, common costs are grouped into homogeneous cost categories[16] and allocated between regulated and non-regulated activities according to the following hierarchy: (1) direct analysis; (2) allocation based on an indirect cost-causative[17] linkage to another cost category that can be directly assigned or allocated and (3) general allocation. As applied to Alascom, this rule provides that, whenever possible, costs must be directly assigned to Bush or non-Bush activities. If costs cannot be directly assigned, they are considered common costs, and they must be placed in common cost pools. The costs in these pools must then be allocated between Bush and non-Bush activities using a factor that reflects cost causality.[18]

5. Although the *Joint Cost Order* did not prescribe specific allocation methods for each cost pool, it established guidelines for selecting cost-causative allocations methods. Whenever possible, common costs must be attributed based upon direct analysis of the origin of the costs themselves.[19] Common costs that cannot be directly attributed must be indirectly attributed based on an indirect, cost-causative linkage to another cost pool or group of cost pools for which a direct assignment or attribution is available.[20] If direct or indirect measures of cost-causation are not available, the cost pool must be allocated using a prescribed general allocator.[21]

6. The second relevant Commission rule is Section 64.903.[22] That rule, as adapted to Alascom, requires that the CAP contain the following information: (a) a list of Bush locations; (b) a chart showing all of Alascom's corporate affiliates; (c) a statement that describes affiliates that engage, or will engage, in transactions with Alascom and that describes the nature, terms, and frequency of such transactions;[23] (d) for each regulated account, a detailed description of the cost pools to which portions of the account will be assigned and the basis on which each cost pool will be allocated between Bush and non-Bush operations; and (e) a description of each time reporting method that Alascom uses and of the employee groups that use that reporting method.

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[11] *See* 47 C.F.R. §§32.27 and 64.901-64.904.

[12] *See MO&O*, 9 FCC Rcd at 3023-3024.

[13] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, CC Docket No. 86-111, 2 FCC Rcd 1298 (*Joint Cost Order*) *recon.*, 2 FCC Rcd 6283 (1987) (*Joint Cost Reconsideration Order*), *further recon.*, 3 FCC Rcd 6701 (1988) (*Further Reconsideration Order*), *aff'd sub nom.* Southwestern Bell Corp. v. FCC, 896 F. 2d 1378 (D.C. Cir. 1990). *See also* 47 C.F.R. §64.901.

[14] The costs under consideration herein are Alascom's regulated costs. Alascom's nonregulated costs are outside the scope of this proceeding. Alascom, however, must also comply with the joint cost rules to ensure that its regulated activities do not subsidize its nonregulated activities. *See supra*. n.5.

[15] 47 C.F.R. §64.901.

[16] Cost categories describe groupings of costs that are homogenous, or similar, in nature for cost allocation purposes. The accounting profession's term for "cost category" is "cost pools".

[17] Costs are apportioned to a cost objective (regulated, nonregulated or common) if a cause and effect relationship can be observed between that cost and its cost objective.

[18] The allocation factor must reflect a cause and effect relationship between costs incurred and Bush or non-Bush activities supported by those costs.

[19] Direct assignment occurs when the costs or resources are incurred to provide either regulated service exclusively or nonregulated service exclusively. Direct attribution occurs when common costs are allocated between regulated and nonregulated activities based on direct measures of cost causation.

[20] The following examples illustrate the difference between direct assignment, direct attribution and indirect attribution. Assume two offices are rented separately. The personnel in one office perform only regulated service and the personnel in the other office perform only unregulated service. The rent for each office can be *directly assigned* to regulated and unregulated because there is no need to allocate. Assume however that rent on office space containing 1,000 square feet of floor space must be apportioned between regulated and nonregulated services. Employees performing only regulated services occupy 500 square feet of floor space, employees performing only unregulated services occupy 200 square feet of floor space and common areas represent 300 square feet of floor space. Fifty percent of the rent can be *directly attributed* to regulated service (500 sq ft/1,000 sq ft), 20 percent (200 sq ft/1,000 sqt) of the rent can be *directly attributed* to unregulated service. The remaining rent for 300 square feet of common space can be *indirectly attributed* to regulated and unregulated services based on relative direct use. In this example 71 percent of the rent for the common areas can be indirectly attributed to regulated services (500 sq ft/700 sq ft) and 29 percent to unregulated services.

[21] For example, under the Joint Cost rules, the general allocator for regulated and nonregulated residual costs would be computed as follows: [*See* 47 C.F.R. §64.901(b)(3)(iii)].

A. The percent of residual costs allocated to regulated services (R%) is computed as follows:

$$\frac{\text{Expenses Directly assigned \& Directly attributed to regulated}}{\text{Total expenses directly assigned \& directly attributable to regulated and nonregulated}} \times 100 = R\%$$

B. The percent of residual costs allocated to nonregulated (N%) is computed as follows: 100% - R% = N%

[22] 47 C.F.R. §64.903.

[23] The Joint Board recommended that the Commission closely examine Alascom's affiliate transactions costs. *See Final Recommended Decision*, 9 FCC Rcd at 2206.

III. DISCUSSION

A. Alascom's Revised CAP Filing

7. Alascom's revised CAP has six sections. Section I provides a brief overview of the purposes of the CAP and provides a flow chart showing Alascom's proposed cost apportionment process. Section II explains how Alascom distinguishes between Bush and non-Bush service areas. Section III describes how Alascom tracks network investment and expenses under the Uniform System of Accounts ("USOA"),[24] and how it apportions these costs between Bush and non-Bush activities. Section IV contains two cost allocation tables that describe the assignment, attribution, and allocation procedure used to apportion each cost element between the Bush and non-Bush activities. The first table, the Master Apportionment Table, performs two functions. The Master Apportionment table distributes the balances in each of the USOA accounts into three cost categories,[25] and also describes the attribution or allocation methods and related cost pools for costs categorized as Customer Service or Administration. The second table, the Operations Apportionment Table, describes the methodology used to assign or attribute costs included in the Operations category between Bush and non-Bush activities. Section V lists Alascom's Bush and non-Bush geographic locations. Section VI explains Alascom's affiliates and describes its affiliate transactions.

B. Comments

8. GCI believes the revised CAP should be rejected and the Commission should adopt a CAP similar to one proposed by GCI.[26] GCI argues that Alascom's revised CAP does not comply with instructions provided by the Bureau in the *CAP Rejection Order* and does not comply with the Commission's cost allocation principles.[27] GCI maintains that, although the *Cap Rejection Order* directs Alascom to increase its direct assignment of costs to either Bush or non-Bush activities, the revised CAP does not reflect an increase in direct assignment of costs.[28] GCI contends that Alascom has not provided sufficient explanation of its cost categories, special studies or allocators to permit a significant review of the plan, and it believes, therefore, that Alascom's procedures in assigning costs between Bush and non-Bush locations will be virtually impossible to validate.[29] GCI argues that Alascom's CAP is unclear regarding the distinctions between Bush and non-Bush locations and that Alascom's list does not correspond to any previous listing of Bush and non-Bush locations. GCI therefore believes Alascom must file a Bush tariff for those locations specifically defined as Bush in previous Commission orders.[30]

9. In its Reply, Alascom states that, under its CAP, approximately 93 percent of its costs are directly assigned or attributed and only 7 percent of the costs are joint and common costs that require allocation.[31] Alascom further states that the joint costs include satellite costs, which are predominantly in the form of operating lease payments and expenses.[32] Alascom states that it allocates costs in accordance with Joint Board and Commission directives that require allocations based on locations rather than on services. Alascom explains that the definition of Bush and non-Bush locations used in its CAP is the definition required by the Joint Board and the Commission. For purposes of the CAP, Bush locations are locations where there is no facilities-based competition.[33] Alascom argues that its distinction between Bush and non-Bush is clear because (1) rural locations in Alaska have tiny populations and it is easy to determine whether there is an earth station in the area; (2) all interexchange carriers list their toll points with the Alaska Public Utilities Commission; (3) GCI and its owner, MCI, provide service in Alaska and are positioned to determine whether facilities-based competition exists in a particular area; (4) as carriers enter or exit communities, the cost apportionment between Bush and non-Bush would change accordingly and rates would be calculated and charged accordingly and (5) the Joint Board/Commission definition is more applicable than the historic definition which requires identifying the number of people in each community and determining whether that community is isolated. Alascom further believes the definition established by the Joint Board/Commission is appropriate because it does not allow Alascom to exercise control over which locations are Bush or which locations are non-Bush.[34]

C. Discussion

10. In the *CAP Rejection Order* Alascom was directed to revise its CAP to: (1) increase the level of cost directly assigned; (2) explain in detail each of its cost apportionment procedures and define each term used in its cost allocation process; (3) provide information to show that costs associated with its nonregulated activities are segregated from the costs under consideration here; (4) provide specified information on the Aurora II Satellite that Alascom leases for use in its operations; (5) provide specified information on its affiliate transactions and (6) review its list of Bush and non-Bush locations for compliance with the Commission's definition of these sites.

(1) Direct Assignment and Attribution

11. Alascom's original CAP failed to explain clearly its methodology for direct assignment and direct attribution.[35] In its revised CAP, Alascom clarifies its assignment and apportionment methodologies by explaining that network

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[24] The Part 32 USOA contains balance sheet and income statement accounts and accounting procedures that all telecommunications carriers subject to the Commission's rules must follow. *See* 47 C.F.R. Part 32.

[25] The three cost categories based on functionality are Operations, Customer Service and Administration. For internal record keeping purposes the administrative category is subdivided into administrative and executive. Some USOA account balances may be included in more than one cost category, *e.g.*, the motor vehicle expense account balance could be included under the Operations category and under the Customer Service category, depending on the use made of the underlying assets.

[26] GCI Comments at 1. *See also*, GCI comments filed October 11, 1994, Attachment D.

[27] *Id.* at 2.

[28] *Id.* at 2-3.

[29] *Id.* at 3.

[30] *Id.* at 4.

[31] Alascom Reply at 2.

[32] *Id.* at 2-3.

[33] *Id.* at 3-4.

[34] *Id.* at 4-5.

[35] Direct assignment occurs when service costs are incurred solely to provide service to Bush or non-Bush areas and are

investment and expenses are coded by geographic locations using cost location codes ("CLOC"s). These CLOCs enable it to disaggregate its investments and expenses to over 900 locations and functions within its network. Alascom retains the CLOC designation in its Part 32 general ledger and uses it to summarize all sub-accounts that have an account balance. Through location specific CLOCs, Alascom is able to directly assign 20 percent of its service costs to Bush and non-Bush activities. Costs that are not location specific but common to Bush and non-Bush are assigned function specific CLOCs that enable direct attribution of 73 percent of its service costs to Bush or non-Bush based on functionality.

12. Alascom specifically identifies and groups investment and costs into groups that share similar cost causative characteristics, which facilitates either direct assignment or direct attribution. Using CLOCs, Alascom is able to directly assign 20 percent of its costs to either Bush or non-Bush. Also, based on an analysis of elements that share common locations or functional characteristics, Alascom is able to directly attribute 73 percent of its costs to either Bush or non-Bush. For its Operations category and Customer Service category costs, Alascom either directly assigns or directly attributes 100 percent of its costs. We find that Alascom's CAP provides clear explanations and a reasonable methodology that results in direct assignment or direct attribution of 93 percent of its costs to Bush and non-Bush locations.

(2) Cost Allocation

13. According to the revised CAP, the costs contained in the Administration category represent approximately 7 percent of total costs. These costs are not attributable to any specific location and must therefore be allocated. Alascom uses two general allocation factors, one for investment and one for expenses. The allocation factor for investment is the ratio of all investment previously assigned and attributed to Bush/non-Bush activities to all previously assigned and allocated investment.[36] The allocation factor for costs is the ratio of all costs previously assigned and attributed to Bush/non-Bush activities to all previously assigned and allocated costs.[37] Alascom's revised CAP explains how costs are grouped into cost pools and how those cost pools are allocated between Bush and non-Bush activities using cost allocation principles described in the Joint Cost rules and adopted in the *MO&O*. We find that Alascom's cost allocation methodology is adequate to ensure that joint and common costs are reasonably allocated between Bush and non-Bush activities.

(3) Nonregulated Costs

14. In the *CAP Rejection Order* we expressed concern that Alascom might include some nonregulated costs in its apportionments to Bush and non-Bush activities, because Alascom included a nonregulated account, Account 1406, Nonregulated Investment in its proposed CAP.[38] In the revised CAP, Alascom no longer includes the Nonregulated Investment account and states that nonregulated cost of service are excluded prior to apportioning costs between Bush and non-Bush activities. Alascom's revised CAP includes no nonregulated accounts and also provides an explanation regarding removal of nonregulated costs prior to its apportionment procedures. We are therefore satisfied that Alascom's CAP sufficiently demonstrates the exclusion of nonregulated costs from its processes for apportioning costs between Bush and non-Bush operations.

(4) Affiliate Transactions and Aurora II Satellite

15. In the *CAP Rejection Order* Alascom was instructed to revise its CAP to include a section discussing its affiliate transactions and to describe the nature, terms and frequency of its affiliate transactions. Alascom's revised CAP provides a section on corporate affiliates and affiliate transactions.[39] In this section Alascom explains the frequency, terms and the nature of its affiliate transactions. Section VI also includes a table that details the nature, frequency and terms of affiliate transactions for services and asset transfers between affiliates and Alascom. We find that Alascom's revised CAP meets the affiliate transaction requirements described under Section 64.903 of the rules.[40]

16. In the *CAP Rejection Order* we instructed Alascom to revise its CAP to include information on the Aurora II satellite and to explain how it apportions costs related to the operating lease of the Aurora II Satellite between its Bush and non-Bush locations. As required by the order, the revised CAP provides an explanation of the 16 transponders on its Aurora II Satellite.[41] It explains that in October of 1992 16 transponders were sold and leased back to Alascom under an operating lease agreement and, since the sale/leaseback, Alascom has purchased 2 additional transponders. The revised CAP explains that the basis of apportioning the costs of its 16 leased and 2 owned transponders between Bush and non-Bush activities is the ratio of the number of Bush terminals or non-Bush terminals respectively supported by the transponders to total terminals supported by the transponders.[42]

(5) Categorization of Bush and Non-Bush Locations

17. In the *CAP Rejection Order* the Bureau instructed Alascom to revise its CAP to justify the sites it classifies as Bush and to remove any sites from its list of Bush loca-

directly assigned to Bush or non-Bush. Direct attribution occurs when service costs are incurred to provide service to both Bush and non-Bush areas and are apportioned using direct measures of cost causation.

[36] In computing the expense ratio, Alascom excluded access costs because Alascom claims such costs are not representative of the distribution of Alascom's costs structure.

[37] Alascom develops separate allocation factors for investment and expense because of the large amount of lease costs attributable to the Aurora II satellite. Alascom explains that the satellite costs are not associated with investment and would distort the results if they were included in an allocation factor for investment.

[38] *See CAP Rejection Order*, para. 16.

[39] *See* Alascom CAP, Section VI, Alascom Corporate Affiliates and Affiliate Transactions.

[40] Section 64.903(3)(4).

[41] *See* Alascom CAP, Services Provided From Affiliates, at VI-4.

[42] Alascom explains that annualized lease expense for its leased transponders through July 1998 will be approximately $11,549,000 per year excluding expenses for control, backup and insurance. Alascom purchased and capitalized two additional transponders in September 1993 and October 1994.

tions that do not qualify as facilities monopolies as defined by the Joint Board. The revised CAP contains a list that includes 14 competitive service locations and 299 noncompetitive service locations.[43] Alascom states that the categorization is made according to a determination of the locations where facilities based competition is present, and will be periodically revised as more or fewer locations become subject to competition.[44]

IV. CONCLUSION

18. Based on our review of Alascom's revised CAP, we conclude that the revised CAP adequately addresses the issues raised in the *CAP Rejection Order*. In its revised CAP, Alascom explains and clarifies its direct assignment, direct attribution and allocation methodologies. Additionally, the CAP (1) provides information that shows nonregulated activities costs are segregated from the regulated activities costs; (2) provides explanations that shows that Alascom directly assigns and directly attributes 93 percent of its costs between Bush and non-Bush activities: (3) provides the requested information regarding the Aurora II satellite and on its affiliate transactions and (4) provides lists of Bush and non-Bush locations in compliance with the Commission's definition of these sites. We direct Alascom to review its CAP and file any changes to its CAP within 60 days of the release of this order. In addition, Alascom shall revise its CAP to reflect the transfer of control from Pacific Telecom to AT&T particularly in Section VI, Alascom Corporate Affiliates and Affiliate Transactions.

V. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, pursuant to authority contained in Sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i) and Section 0.291 of the Commission's rules, 47 C.F.R. §0.291, that the cost allocation plan filed by Alascom, Inc., IS APPROVED.

20. IT IS FURTHER ORDERED, that Alascom shall revise its CAP to reflect the transfer of control from Pacific Telecom to AT&T particularly Section VI, Alascom Corporate Affiliates and Affiliate Transactions.

21. IT IS FURTHER ORDERED, that revised copies of Alascom's cost allocation plan shall be submitted to the Commission within 60 days of the release date of this order.

22. IT IS FURTHER ORDERED, that the request of General Communication, Inc., that the Commission reject Alascom's revised CAP is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

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[43] Alascom CAP at Section V.
[44] Alascom revised CAP at I-2.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-13

In the Matter of

Amendment of Section 73.202(b)	RM-8156
Table of Allotments	RM-8234
FM Broadcast Stations	
(Blanchard, Louisiana and	
Stephens, Arkansas)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: July 31, 1995; Released: September 11, 1995

By the Commission:

1. The Commission has before it an Application for Review ("Application"), filed with respect to the *Report and Order* in this proceeding, 8 FCC Rcd 7083 (1993), which granted the request of Daryl L. Bordelon ("Bordelon") and allotted channel 271C3 to Blanchard, Louisiana as its first local aural transmission service. The Application was filed by Arkansas Wireless Company ("Wireless"), which had filed a counterproposal in the proceeding requesting allotment of Channel 271A to Stephens, Arkansas as its first local aural transmission service. Bordelon filed an Opposition, and Wireless filed a Reply. Additionally, Wireless filed a Motion for Stay of the filing window. No oppositions were filed to the Motion for Stay. We hereby deny the Application for Review and dismiss the companion Motion for Stay as moot.

I. BACKGROUND

2. The *Report and Order* allotted Channel 271C3 to Blanchard, Louisiana as its first local service, denying Wireless' counterproposal to allot Channel 271A to Stephens, Arkansas as that community's first local service. In making that decision, the staff evaluated the case under the fourth allotment priority, other public interest matters, since both the proposal and counterproposal would have provided a first local service (under priority 3).[1] The *Report and Order* noted that the proponents had not offered evidence to distinguish their proposals but that a Commission engineering analysis had indicated that both communities are well-served by reception services (Blanchard -- ten FM, 21 daytime AM, and 3 nighttime AM; Stephens -- 7 FM and 10 daytime AM). Thus, the *Report and Order* based its decision on the fact that Blanchard is the larger community, with a 1990 population of 1,175 as opposed to 1,137 for Stephens. While admitting that the difference is small, the *Report and Order* noted that this was the only distinguishable factor between the two proposals.

3. *Application for Review of Wireless.* Wireless argues that the Commission must review the *Report and Order* based on the "very slight difference" in population between the two communities (38 people) and "because of the limited analysis made of other public interest factors." Application, p. 2. Wireless argues that the cases cited in the *Report and Order* are inapposite because the population differences are not as small as in the instant case. *Id.* at p. 3. Wireless also argues that Blanchard is within the Shreveport MSA and its "urbanized area," while Stephens is not. Wireless notes that Stephens is in a rural area and a new service to Stephens would greatly benefit the people who live in that area. *Id.* at p. 3. Wireless argues that, while it may be factually correct to say that both communities are reasonably served, service to the two communities is not equivalent because Stephens has no nighttime AM service and because Blanchard has from 50% to 100% more radio services in each of the FCC-enumerated categories than does Stephens. Thus, according to Wireless, population is not the only difference between the two communities. *Id.* at p. 4.

4. Wireless further argues that where the two communities are this close in population, the Commission "must conduct a significant review of the public interest matters which should be considered in making an allocation." *Id.* These factors, according to Wireless, are: (1) "the presence of a major metropolitan area which affects one community as a suburb while the other community has no such comparable benefit"; (2) the presence and activity level of other media within the potential communities of license, which, according to Wireless, provide less service to Stephens; and (3) that Stephens has a black population of 434 persons, while Blanchard has 7 black residents, which, according to Wireless, indicates that Blanchard is a white bedroom community of a large city, while Stephens is a rural community with a significant minority population. Wireless also suggests that the population of Stephens may be higher since the black population may have been undercounted in the 1990 census by 4.8 percent. Accordingly, Wireless claims that the staff decision is arbitrary and capricious because the staff based it on insufficient information and that the staff should have issued a Further Notice to request additional information regarding the communities.

5. *Opposition to Application for Review of Bordelon.* Bordelon argues that the Commission staff correctly selected Blanchard, the more populous community, over Stephens.[2] While agreeing that Blanchard receives more reception service than Stephens, Bordelon argues that reception of service from a nearby larger community is no substitute for local service. Bordelon further notes that Blanchard's alleged status as a white bedroom community

[1] The FM allotment priorities are:
(1) First full-time aural service.
(2) Second full-time aural service.
(3) First local service.
(4) Other public interest matters.
Priorities 2 and 3 are given co-equal weight. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

[2] Opposition, p. 3.

versus Stephens' as a rural community with a significant minority population has no significance under the allotment priorities.[3] Further, Bordelon finds no significance in the undercounting of minorities alleged by Wireless, noting that the Commission must rely on the Census. Finally, Bordelon attached an exhibit demonstrating that the proposed Blanchard channel would serve 342,776 persons in an area of 4,779.4 square kilometers, while the proposed Stephens station would serve 33,337 persons within an area of 2,501.7 square kilometers. The Blanchard station would serve 118,342 blacks, compared to 10,938 blacks served by the Stephens station. Thus, the Blanchard station would serve more than 10 times as many people, including almost 11 times more blacks.[4]

6. *Reply of Wireless.* Wireless contends that the Commission has never before based a distinction on population grounds on a number as small as 38 people. Wireless asks the Commission to delineate a framework of tests to be used in a very close case between two equally deserving communities.

7. *Motion for Stay of Wireless.* Wireless also seeks a stay of the filing window, arguing that it is likely to prevail because neither of the two cases cited as authority by the staff involved population differences as small as in the instant case and because Stephens will be preferred based on other factors. Wireless argues that the parties will not be injured by waiting, that the stay would conserve the resources of the parties and the Commission, and that Wireless would be injured absent a stay since it has expended significant time and effort in seeking the Stephens channel. The filing window for Blanchard has opened and closed. Several mutually exclusive competing applications for construction permit have been filed for Channel 271C3 at Blanchard, and these applications remain pending. Given our disposition of the Application for Review, the Motion for Stay is moot.

II. DISCUSSION

A. Procedure

8. *New Arguments.* Under Section 5(c)(5) of the Communications Act, 47 U.S.C. § 155(c)(5), and Section 1.115(c) of the rules, 47 C.F.R. § 115(c), no application for review will be granted if it relies upon questions of fact or law upon which the designated authority has been afforded no opportunity to pass. *See Kenny D. Hopkins,* 5 FCC Rcd 604, 605 (1990). Wireless' Application relies upon the argument that the Commission staff erred because it made the decision in this case only on population grounds and did not consider other significant differences between the two communities. The staff has had no opportunity to pass on these arguments or on the alleged other differences between the two communities. As the Application raised factual issues not first raised to the designated authority, it is subject to dismissal as defective.

9. *Factors warranting review.* Under Section 1.115(b)(2), 47 C.F.R. § 115(b)(2), an application for review must list the factors warranting Commission consideration from among an enumerated list. Absent compliance, the application may be dismissed as procedurally defective. *See Chapman S. Root Revocable Trust,* 8 FCC Rcd 4223, 4224 (1993). The Application did not list the factors warranting Commission review. Accordingly, the Application is subject to dismissal as defective. Nonetheless, despite the foregoing procedural defects, we will briefly consider the arguments made in the Application on our own motion.

B. Merits

10. Contrary to Wireless, the *Report and Order* did not err in basing its decision in this case on the population difference between the two communities. While the population difference involved in the instant case is small, nonetheless, on the facts of this case, and in applying the FM allotment priorities, it is dispositive. In *Revision of FM Assignment Policies and Procedures,* 90 FCC 2d 88, 92 (1982), the Commission noted that it would compare population sizes in resolving a choice between counterproposals invoking co-equal priorities 2 and 3. Moreover, it noted that the comparison under priority 4 "can take into account the number of aural services received in the proposed service area, the number of local services, the need for or lack of public radio service and other matters such as the relative size of the proposed communities...." *Id.* at n. 8.

11. Accordingly, in a choice among competing counterproposals both involving priority 3 (first local service), the Commission has uniformly made the decision based on population difference and a comparison of reception services. And, where it has found that neither community falls below a threshold level of reception services, the Commission has based its decision on a straight population comparison. Thus, in *Report and Order (Northwye, Cuba, Waynesville, Lake Ozark, and Eldon, Missouri)* in MM Docket No. 89-120,[5] we compared two competing counterproposals that would have provided a first local service based on population, noting that "[s]ince both communities have at least 6 reception services, the comparison should be made based on the population of the communities."[6] Further, in *Report and Order (West Liberty and Richwood, Ohio)* in MM Docket No. 90-131,[7] the staff allotted the channel to Richwood based on its larger population (2181 vs. 1653) where Richwood received six aural services and West Liberty received five, finding that neither community was therefore underserved.[8]

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[3] *Id.* at p. 4.
[4] *Id.* at p. 5.
[5] 7 FCC Rcd 1449, 1452 (Chief, Allocations 1992).
[6] *See also Report and Order (Seymour and Pigeon Forge, Tennessee)* in MM Docket No. 86-98, 2 FCC Rcd 2016 (Chief, Policy and Rules 1987) (since both communities receive at least 5 aural services, comparison under priority 3 will be made based on population).
[7] 6 FCC Rcd 6084 (Assistant Chief, Allocations 1991).
[8] *Accord, Report and Order (Three Oaks and Bridgman, Michigan),* 5 FCC Rcd 1004 (Chief, Allocations 1990) (Bridgman preferred based on population (2235 vs. 1774); not distinguishable based on reception services (Bridgman -- 5 FM, 12 daytime AM, 5 nighttime AM; Three Oaks -- 6 FM, 10 daytime AM, 5 nighttime AM); *Report and Order (Obion and Tiptonville, Tennessee)* in MM Docket No. 90-22, 7 FCC Rcd 2644 (Acting Chief, Allocations 1992) (both communities are well-served with Obion having 17 and Tiptonville 18 aural services, so Tiptonville is preferred based on larger population (2149 vs. 1,241); *Report and Order (Brownstown, Cannelton and Edin-*

12. Wireless argues that *Three Oaks and Bridgman, Michigan*,[9] cited in the *Report and Order*, is not on point because, in the instant case, there is no equivalence finding in the availability of reception services, no analysis of the type or status of the communities and their relationship to surrounding communities or rural areas, nor any analysis of whether the community is a town or city. Application, p. 7. However, contrary to Wireless, the decisional factor in *Three Oaks* was the population difference, and the Commission noted that although the population difference there was small, "on any other conceivable and documented evidentiary basis for a decision, the proposals are even less distinguishable." 5 FCC Rcd at 1004. Wireless also claims that *Bostwick and Good Hope, Georgia*,[10] also cited in the staff decision, is inapposite because in that case, although the population difference was small--120 persons--Bostwick, the preferred community, was almost 50% bigger than Good Hope and received less radio service (four fewer Atlanta FM stations than Good Hope). Nonetheless, contrary to Wireless' contention, the decision in Bostwick was made on the basis of the population difference alone. As the *Report and Order* stated: "The new allotment should be given to Bostwick as the larger of the two communities."[11]

13. Wireless has cited no reason or legal precedent to cause us to reverse this long-standing precedent. Accordingly, as neither community is underserved, we find that the staff did not err in basing its comparison between the two communities on the difference in their population.[12] Further, as Bordelon indicates, even though Blanchard receives more signals than Stephens, reception of service from another community is no substitute for local service.[13] Because there was a tie underp the FM priorities since both competing proposals propose a first local service under priority 3, the tie was resolved by examining the proposals under priority 4, and, in examining the proposals under priority 4, substantial weight was given to the population of the community sought to be served, as the proposals seek to provide a first local transmission service. Thus, as the staff did not err in basing its decision in this case on the population difference between the two communities, we decline to delineate a framework of tests to be used in a very close case between two equally deserving communities, as requested by Wireless. Further, while Wireless suggests that the staff ignored other factors and should have invited further comment with respect to additional factors based on the small population difference in this case, these factors were not brought to the staff's attention during the rule making.[14] Moreover, Wireless points to no legal precedent for imposing such an obligation to seek additional comments. Finally, as the population difference is dispositive, the other factors raised by Wireless are irrelevant. We leave in place the staff decision.

14. Accordingly, IT IS ORDERED That the Application for Review filed by Arkansas Wireless Company IS DENIED.

15. IT IS FURTHER ORDERED That the Motion for Stay IS DISMISSED as moot.

16. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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burgh, Indiana, et al.) in MM Docket No. 91-271, 7 FCC Rcd 3173, 3176 (Acting Chief, Allocations 1992) (as neither of 2 communities is underserved and each receives ample aural reception service (33 for Edinburgh and 22 for Brownstown), Edinburgh gets the channel based on greater population (4536 vs. 2872). *See also Report and Order (Bostwick and Good Hope, Georgia)* in MM Docket No. 89-566, 6 FCC Rcd 5796 (Assistant Chief, Allocations 1991) (Bostwick preferred based on population (370 vs. 250); both communities well served (9 for Bostwick vs. 13 for Good Hope)).

[9] 5 FCC Rcd 1004 (Chief, Allocations 1990).

[10] 6 FCC Rcd 5796 (Assistant Chief, Allocations 1991).

[11] 6 FCC Rcd at 5796.

[12] Wireless argues that the population difference between the two communities should be negated because Stephens has a larger minority population and because blacks were undercounted in the 1990 census. These arguments have no merit. Wireless has provided no specific evidence that blacks in Stephens were undercounted. Moreover, absent an alternative authoritative source of population data, we have traditionally relied and will continue to rely on Census figures in the implementation of our rules.

[13] *Report and Order (Rochester and Walton, Indiana)* in MM Docket No. 92-192, 8 FCC Rcd 955, 957 (Chief, Allocations 1993); *Report and Order (Conklin, New York)* in MM Docket No. 88-166, 5 FCC Rcd 1104, 1105 (Chief, Allocations 1990); *Report and Order (Clinton, Louisiana)* in BC Docket No. 78-367, 45 RR 2d 1587, 1588 (Chief, Broadcast Bureau 1979).

[14] With respect to these additional factors, moreover, we do not consider the comparative minority populations of two communities under our allotment priorities. While we did adopt a minority service priority in Docket No. 84-231, the omnibus allotment rule making to implement Docket No. 80-90, *Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments*, 100 FCC 2d 1332 (1985), we noted that such a priority is a matter more appropriately considered in the hearing process than in the allotment phase. Id. at 1336, 1337. In any event, we have subsequently held that the Docket 84-231 allotment priorities did not supplant the FM allotment priorities established in 1982. *Warren and Niles, Ohio*, 59 RR 2d 1179, 1182 (Chief, Policy and Rules Div. 1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-388

In the Matter of

Amendment of Section 73.606(b), RM-5385
Table of Allotments,
TV Broadcast Stations.
(Kenansville, Florida)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: July 31, 1995; Released: September 11, 1995

By the Commission:

1. Before the Commission is an Application for Review filed by Wabash Valley Broadcasting Corporation, Inc., ("Wabash"), (licensee of Station WOGX(TV), Ocala, Florida, of the *Memorandum Opinion and Order*, 5 FCC Rcd 2663 (Policy & Rules Div. 1990) (*"MO&O"*), in this proceeding.[1] The *MO&O* allotted UHF television Channel 31 to Kenansville, Florida. Meredith Corporation ("Meredith") filed an opposition to Wabash's Application for Review, and Wabash filed a reply.

2. *Background*. This proceeding originated with a petition for rule making filed by Meredith requesting an allotment of UHF Channel 31 to Kenansville, Florida so as to provide its first local television service. In response to that petition, the staff issued a *Notice of Proposed Rule Making*, 1 FCC Rcd 143 (Allocations Br. 1986) (*"Notice"*), seeking comments and directing Meredith to present evidence of Kenansville's community status for allotment purposes. Meredith submitted evidence that Kenansville has a population of approximately 700, its own post office, zip code, and telephone exchange. Moreover, Meredith stated, Kenansville has its own community center, cemetery, and Baptist church, as well as several civic groups and businesses.

3. Commenters, including Wabash's predecessor-in-interest, opposed the proposal on two grounds. First, they alleged that Kenansville was not a community for allotment purposes because it lacked the requisite indicia for community status, citing (*Vimville, Mississippi*, 55 RR 2d 256 (Policy & Rules Div. 1983), *appl. for review denied*, FCC 85-141, released March 27, 1985 (*"Vimville"*). In essence, they argued that Kenansville had *de minimis* business activity with one grocery store/gas station, a population of less than 100 persons, and no local government. Second, they claimed that Meredith had not made a legitimate expression of interest in activating a television station at Kenansville because the Commission's "duopoly" rule[2] would prohibit the common ownership of a Kenansville television station and Meredith's Station WOFL-TV, Orlando, Florida, due to the overlap of their Grade B contours. Meredith responded that it had submitted a valid expression of interest in applying for the channel and that multiple ownership questions are relevant at the application, as opposed to the allotment, stage. In any event, Meredith indicated that it would apply to operate the Kenansville station as a satellite television station, which would rebroadcast the programming of its Orlando station.

4. In the *Report and Order* in this proceeding, 2 FCC Rcd 7194 (Allocations Br. 1987) (*"R&O"*), the staff first found that the "duopoly" rule would not bar Meredith's use of Channel 31 at Kenansville because Meredith proposes to operate the station as a terrestrial satellite television station and because satellite stations are exempted from a strict application of the contour overlap prohibition of the "duopoly" rule.[3] [4] However, the staff denied Meredith's rule making petition to allot Channel 31 (to Kenansville because it had not met its burden to demonstrate that Kenansville is a community for allotment purposes. While Meredith had shown that Kenansville is listed in the *Rand-McNally Commercial Atlas* with a population of 700 and has a volunteer fire department, a civic center, civic organizations, a post office, a church, and its own zip code, Meredith had not demonstrated that these indicia of community status had a connection with Kenansville as opposed to another community. The staff also questioned the level of economic activity because specific businesses had not been documented. Finally, the staff Noted that other characteristics of community status such as a city hall, local government, newspaper, and bank are missing, and that government services are instead provided by Osceola County.

5. Meredith requested reconsideration of the *R&O*, contending that the staff misapplied the test for community status by requiring proof that Kenansville possessed every indicia of community status. Rather, Meredith claimed that the staff should have determined whether the evidence, taken as a whole, indicates that residents of Kenansville consider themselves as a community. Meredith further contended that the information previously provided supports this conclusion and that this information had clearly indicated which activities and indicia were attributable to Kenansville as opposed to Osceola County.

6. Upon reexamination of the evidence Meredith originally presented, by *MO&O*, the staff granted Meredith's request for reconsideration. It relied upon *Beacon Broadcasting*, 2 FCC Rcd 3469 (Comm. 1987), *aff'd* 2 FCC Rcd 7562 (Comm. 1987), in concluding that the burden of establishing community status is not stringent and, there-

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[1] Public notice of the filing of Wabash's Application for Review was given in Report No. 1878, February 18, 1992. *See* 57 Fed. Reg. 6224 (1992).

[2] *See* 47 C.F.R. §73.3555(b)(2). The Commission's television duopoly rules prohibit common ownership of two or more commercial TV stations whose Grade B contours overlap.

[3] *See* 47 C.F.R. § 73.3555, Note 5

[4] The Commission has under consideration whether to relax its national and local television ownership rules. *See Notice of Proposed Rule Making* in MM Docket No. 91-221, 7 FCC Rcd 4111 (1992), *Further Notice of Proposed Rule Making*, now consolidated with *Television Satellite Stations Review of Policy and Rules* in MM Docket No. 87-8, 10 FCC Rcd 3524 (1995).

fore, the evidence submitted by Meredith was sufficient to determine that Kenansville's residents conceived of themselves as a community. Cited in particular was the presence of civic organizations, a civic center, and a church, all of which have "Kenansville" in their names. The staff also cited *Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments (Semora, North Carolina)*, in MM Docket No.84-231, 5 FCC Rcd 934 (Comm. 1990) (*"Semora"*) as an example of a tiny locale found to be a community for allotment purposes. The *MO&O* also determined that with a site restriction, Meredith could operate a full service broadcast facility from Kenansville without creating Grade B contour overlap between a Kenansville station and Meredith's television station in Orlando in violation of the duopoly rule. Accordingly, UHF Channel 31 was allotted to Kenansville, Florida, for that community's first local television service.

7. *Application for Review.* Wabash argues that, as a matter of law, the *MO&O* is incorrect for two reasons. First, Wabash contends that the staff should not have relied upon, as one factor in its decision, the business activity generated by residents of outlying areas. Wabash contends that reliance on this factor is inconsistent with the D.C. Circuit's recent pronouncement that local businesses that "are not aimed primarily at local . . . residents but rather serve a wider geographic area" undermine a finding of community. *Reeder v. FCC*, 865 F.2d 1298, 1305 (D.C. Cir. 1989) (*"Reeder"*).

8. Second, Wabash alleges that Kenansville lacks the essential attributes of a "community" under Commission precedent. For example, Wabash argues that the evidence failed to demonstrate that Kenansville residents consider themselves "a geographically identifiable population grouping," citing to the *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 101 (1982). Wabash notes the absence of any statements from community members that they perceive of themselves as belonging to a population grouping, as submitted in *Semora*, 5 FCC Rcd at 934 where community status was found. Also noted by Wabash were affidavits submitted by residents in *North Naples, Florida*, 41 RR 2d 1549, (1553-54 (Broadcast Bureau 1977) (*"North Naples"*), that they did not consider it a "single cohesive community" and, thus, precluded a finding of community status. Likewise, citing *Vimville, supra*, Wabash contends that the presence of a single grocery/gas station is an insufficient level of commercial activity to justify a finding of community status. Wabash also argues that the absence of any local government or local newspaper is strong evidence that Kenansville is not a community. Citing to *Declaratory Ruling*, 55 FCC 2d 187, 189 (1975), Wabash asserts that "in most cases a community is a city, town, village, or other political subdivision" and that the population of Kenansville is too small to warrant a television allotment.

9. As a final matter, Wabash contends that Meredith's allotment request would circumvent the Commission's duopoly rules by extending the reach of its full service Orlando station, violating the spirit of the Commission's multiple ownership rules. In this regard, Wabash contends that Meredith has no legitimate interest in serving the people of Kenansville, and that it intends to impermissibly expand its television coverage of central Florida by employing a Kenansville satellite station.

10. In opposition, Meredith asserts that the Application for Review is the latest in a series of Wabash's obstructionist tactics begun in 1984 intended to thwart competition to Wabash's operations from Meredith's provision of television service in central Florida.[5] Meredith recounts the arguments advanced by Wabash, citing instances where they have already been considered and rejected by the staff, and, accordingly, Meredith asserts, the arguments merit no further consideration by the Commission. On the merits, Meredith urges that the staff's determination that Kenansville is a community comports with Commission precedent, citing, in particular, the general standard as articulated in *Beacon Broadcasting, supra*. Finally, Meredith asserts that the intended ultimate use of the allotment (it stated that its station would operate as a satellite) is not considered at the allotment stage of the proceeding.

11. In reply, Wabash details the attributes of various communities denied community status and demonstrates that they had at least as many, and in most cases more, indicia of such status than Kenansville, citing to a number of decisions by Commission staff acting on delegated authority.[6] Wabash also claims that, unlike *Semora, supra*, Meredith failed to show, through objective and subjective evidence, that Kenansville businesses primarily served residents there.

12. *Discussion.* On review of the record established in this proceeding, we find that Wabash has failed to satisfy its burden, as set forth by Section 1.115 of the Commission's Rules, to demonstrate that the *MO&O* conflicts with the relevant law or precedent in determining that Kenansville is a community for allotment purposes. In reaching this decision, we note that contrary to Meredith's assertion, it is proper for the Commission to consider matters previously considered and rejected by the staff where the requirements of Section 1.115 have been met. We have reexamined the basis for the finding of community and conclude that it is in accord with the leading Commission-level decisions on the subject. *See Semora, Beacon Broadcasting, (supra,* and *Seven Locks Broadcasting Co.*, 37 FCC 82 (Comm. 1964) (*"Seven Locks"*). Where a locality is asserted to be a community and it is not incorporated or listed in the U.S. Census, the proponent must show that it is a geographically identifiable population grouping. In this regard, we reject Wabash's assertion that because Meredith failed to submit affidavits from community members indicating that they conceive of themselves as a distinct geographical grouping, we must conclude that no such grouping exists in Kenansville.[7] We have determined that community status may be established by either objective *or* subjective evidence indicating the existence of a community. *Beacon*

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[5] We reject Meredith's argument that Wabash lacks standing to request review, alleging that it will not be injured by the allotment at Kenansville. Wabash established standing to participate in this proceeding by filing timely comments to the proposal. *See* § 1.115 of the Commission's Rules.

[6] Specifically, Wabash cited *North Naples, supra; Coker, AL*, 43 RR 2d 190, 193 (Broadcast Bureau 1978) (*"Coker"*); *Ansley, AL*, 46 Fed. Reg. 58,688 (Policy & Rules Div. 1981); and *Vimville, supra* at 258.

[7] We note that although Meredith submitted an affidavit describing services attributed to Kenansville and other materials proffered to support Kenansville as a community, those materials were not relied upon to arrive at the decision, as they were regarded as new evidence, and therefore untimely.

Broadcasting, supra at 3471. Here, the *MO&O* indicates that the finding of community status was based on the objective criteria supplied by Meredith. We conclude, therefore, that Meredith met its burden of proof, initially imposed in the *Notice*, on providing evidence of Kenansville's community status. We deem the evidence presented by Meredith as sufficient, and decline to draw a negative inference based on a lack of subjective evidence, that is affidavits from local residents. These indicia of community status need not be overwhelming nor very extensive, in that the test is not "too stringent," as we held in *Seven Locks*. We stated in *Semora* that such factors in isolation would not necessarily make an area a community, but when weaved together they can give strong evidence of a community for allotment purposes. *Semora, supra* at 935.

13. Although Kenansville does not have a local government, it does have two indicia of community status that have justified a finding of community in the leading Commission cases on this subject. First, there are at least seven civic organizations with Kenansville in their names.[8] Second, there are a significant number of businesses located in Kenansville. While the *R&O* and *MO&O* in this proceeding found that Meredith had documented the existence of only one grocery/gas station, we take official notice of the fact that Osceola County, of which Kenansville is a part, has issued licenses for at least 30 businesses in Kenansville, including three restaurants and a motel.[9] Contrary to the staff's finding in the *R&O*, these indicia have a direct nexus with Kenansville and provide support for a finding that the residents of Kenansville conceive of themselves as a community. Moreover, the factors present here are similar to those in *Beacon Broadcasting, Seven Locks*, and *Semora*, where small communities having no local governments had a number of business and civic organizations.[10] Third, we reject Wabash's argument that a community with a population of 700 or less is too small for the allotment of a television channel. As pointed out in the *R&O*, at least four communities with populations of less than 700 were allotted television channels. *R&O, supra* at 7196, note 4.

14. The cases cited by Wabash where community status was denied on the basis of too few indicia offered to support a finding of community, can be distinguished from the instant case involving Kenansville. In *Vimville, supra*, cited by Wabash as involving a locality not unlike Kenansville, no civic organizations were found and no organization with "Vimville" in its name was identified except the fire department. By way of comparison, the evidence presented by Meredith showed the existence of a number of Kenansville community organizations, many of which incorporate "Kenansville" in their names. Likewise, *North Naples, supra*, can be distinguished from this case because certain of its residents contended affirmatively by affidavit that they did *not* recognize it as such. In *Coker*, note 6, *supra*, the petitioner, even after being requested to do so, failed to provide information to "show that businesses are located in Coker for the purpose of serving the common needs of the citizens," and failed to provide the names of businesses or other institutions, which "could have connected their purpose with Coker's residents." *Coker, supra* at 193. Here, in responding to the *Notice*, the proponent demonstrated that the community organizations had a nexus with and served the residents of Kenansville.

15. We reject, further, Wabash's contention that under *Reeder, supra*, a determination that local businesses are "not aimed primarily at local . . . residents but rather serve a wider geographic area" actually undermines a finding of community. Our review indicates that Wabash's reliance on *Reeder* is misplaced, as the court did not consider that issue on the merits, but remanded the matter for fact-finding. On remand, the Commission observed that "the fact that persons from outside [the community] may participate in commercial activities in the community does not foreclose a finding of community status, but instead serves as evidence that persons from surrounding areas view [the community] as a center of business activities for a surrounding area." *Semora, supra* at 935. We, therefore, conclude that evidence establishing that persons from outside of Kenansville involve themselves in that community's activities does not diminish, but rather enhances, the community status of Kenansville.

16. As a final matter, we reject as meritless Wabash's allegation that Meredith's ongoing rule making petition circumvents the duopoly rule. This matter was fully considered and properly decided in the decisions below, and no new information has been provided. Moreover, such matters are more appropriately addressed at the application, as opposed to the allotment, stage.[11]

17. IT IS ORDERED, That the Application for Review filed by Wabash Broadcasting Corporation is DENIED.

18. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

19. For further information concerning this proceeding, contact J. Bertron Withers, Jr., Mass Media Bureau, (202) 418-2180.

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[8] These include senior citizen, 4H, and rancher groups. *See* Meredith Comments In Support of NPRM, Attachment A.

[9] Kenansville also has its own volunteer fire department, a community center, and a church, all of which have "Kenansville" in their names.

[10] While the *R&O* and *MO&O* in this proceeding found that Kenansville's population was 700 based on the 1990 edition of *Rand-McNally Commercial Atlas*, we find that it is unclear as to the precise population for Kenansville. In this regard, we note that neither the U.S. Census nor Osceola County maintain population records for Kenansville. We estimate, however, that the population likely ranges from 170 to 450 depending on the source utilized. Osceola County Planning Department records indicate that there are approximately 63 housing units in Kenansville. Since there is an average of 2.7 persons per housing unit in Osceola County, this would lead to an approximate population of 170 residents in Kenansville, as compared with 450 residents listed by the 1994 edition of the *Rand-McNally Commercial Atlas*.

[11] There is currently a freeze on amendments to the television table of allotments and on applications for vacant TV allotments in areas surrounding the top 30 TV markets. *See Order*, 52 Fed. Reg. 28,346, published July 29, 1987. Kenansville is within the area covered by the freeze, as its allotment site lies within the minimum co-channel distance [329 km (204.5 mi)] of the Tampa/St. Petersburg and Miami markets. That site is located 148.3 km from Tampa, 164.4 km from St. Petersburg, and 230.7 km from Miami. While the allotment of Channel 31 to Kenansville itself is not subject to the freeze because Meredith's rule making petition was filed before the effective date of the freeze, no applications have been or can be filed for Channel 31 pending the possible reallocation of spectrum for advanced television.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Hayward, Inc.	CUID Nos. CA0099 (Foster City), CA0370 (Hayward), CA0416 (San Leandro) and CA1334 (Alameda)
TCI Cablevision of San Jose, Inc.	CUID No. CA0208 (Sunnyvale)
TCI Cablevision of Contra Costa County, Inc.	CUID Nos. CA0241 (Martinez), CA0288 (Danville), CA0289 (Contra Costa South) and CA1395 (Walnut Creek)
TCI Cablevision of Colorado, Inc.	CUID No. CO0263 (Log Lane)
TCI of the Heartlands, Inc.	CUID No. IA0043 (Humboldt)
TCI of Illinois, Inc.	CUID No. IL0032 (Macomb), IL0040 (Aroma) and IL0043 (Bourbonnais)
TCI Cablevision of Maryland, Inc.	CUID No. MD0024 (Cumberland)
TCI Cablevision of Texas, Inc.	CUID Nos. TX0087 (Liberty) and TX0205 (Corpus Christi)
Heritage Cablevision of Texas, Inc.	CUID No. TX0171 (McAllen)

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 1995; Released: May 16, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (individually "Operator" and, collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC

[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operators implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in prices for the period after May 14, 1994 may be required to reflect the fact that the prices during the earlier period, which are used as the starting point to calculate the prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Prospective and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on the respective Operators and received by the Commission on the dates set forth on Appendix A. Operators filed FCC Form 393s in response; Operators have also filed amended and supplemental Form 393 filings.[11]

5. For some of the communities at issue in this Order, Operators' actual CPS tier prices were above the maximum permitted prices that they calculated for the CPS tier and, thus, Operators have failed to demonstrate that their prices for the CPS tier were not unreasonable.[12] For other communities, Operators' prices were at or below their calculated maximum permitted prices. Upon review of Operators' submissions, we have found that in every case Operators have miscalculated their maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operators' calculations in their Form 393s:

a. The 1992 Cable Act requires operators to fully unbundle equipment and installation costs from programming costs.[13] The Commission's regulations implement Congress's directive by requiring operators to establish an equipment basket.[14] Section 76.923(c) of the Commission's regulations specifically states that equipment basket costs shall include "the direct and indirect material and labor costs of providing, leasing, installing, repairing, and servicing customer equipment." In its Order adopting rate regulations, the Commission amplified this regulation by stating that "[t]he basket will include an allocation of all those system joint and common costs that service installation, leasing, and equipment repair share with other system activities, excluding general system overhead."[15] When completed correctly, Part III of FCC Form 393 unbundles equipment costs from programming costs.

b. Operators, however, have not properly completed Part III of their FCC Form 393s and thus have not completely unbundled equipment and installation costs from programming costs as directed by the 1992 Cable Act and the Commission's regulations. Specifically, on Schedule A of Part III, Operators have not reported any maintenance facility cost for installations and service of customer leased equipment, and on Schedule B they have not reported any costs for utilities. The lack of maintenance facility and utility costs might be correct if Operators' Schedule B allocations reflected that contract or third-party labor was performing all equipment installations and repairs. The allocations that Operators make in their Schedule B Analyses, however, indicate that their own employees performed customer equipment installation and maintenance.

c. Not only are Operators' Schedule B allocations inconsistent with not having any maintenance facility costs, their allocations are also inconsistent with the argument that the repair of converters and remotes was performed off-premises by a third party. Operators have included on Schedule B and their Schedule B Analyses entries for contract labor and "Converter Maintenance." These entries, however, further indicate that Operators have not fully unbundled their equipment costs from their regulated service costs. In their Part III, Step C, Line 9 explanations, Operators set forth the number of hours that they devoted to maintenance and service of remotes and converters.[16] If Operators' contract labor and converter maintenance entries are added together and the sum is divided by the number of reported hours for converter and remote maintenance, the resulting cost per hour in these communities ranges from $2.50 to $17.91. Moreover, this calculation overstates Operators' reported labor costs because it ignores that some portion of the converter maintenance cost must be for supplies. We have recognized that it is not unreasonable to assume that operators should incur a contract labor charge of $25.00 per hour for the service and maintenance of remotes and converters.[17] Not only are Operators' reported labor costs for the service and maintenance of remotes and converters substantially below this figure, they are also well below their own hourly service charge as calculated on Line 5, Step A, Part III of their Form 393s.[18] Thus, Operators' contract labor cost added to their Converter Maintenance cost cannot represent all of Operators' converter maintenance costs, and there must remain costs related to installations and service of customer leased equipment that Operators have not included on Form 393, Part III.[19]

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[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operators filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] Operators were charging more than the maximum permitted prices they calculated in the franchise areas designated by the following CUID Nos.: CA0099, CA0208, CA0241, CA0288, CA0289, CA0370, CA0416, CA1334, CA1395, CO0263, IL0043, IL0040 and MD0024.

[13] 47 U.S.C. § 543(b)(3).

[14] 47 C.F.R. § 76.923(b).

[15] Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 at 5815, ¶ 295 (1993) (footnote omitted). *See also* First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164 at 1190, ¶ 47 (1993).

[16] *See also* Operators' FCC Form 393s at Part III, Line 9 and Line 16.

[17] *See* Harron Communications Corp. v. Commonwealth of Massachusetts Community Antenna Television Commission, CUID Nos. MA0225, MA0247, MA0229, MA0228, MA0245, MA0224, MA0246, DA 95-160, at ¶ ¶19 -20 (Cab. Serv. Bur., released Feb. 7, 1995).

[18] Operators' calculated hourly service charge in these communities ranges from $16.05 to $29.53.

[19] If, as in other communities, Operators are charging a wire maintenance fee, we would expect to see these costs reflected in Operators' rate justification filings. The absence of these costs would provide additional evidence that Operators have not fully unbundled their equipment costs from their programming costs,

d. Operators have not justified their Part III allocations. The Commission has repeatedly stated that where an operator does not provide adequate information to justify its rate, the Commission will set the maximum permitted rate based on the best evidence available to it.[20] Simply put, Operators cannot be permitted to delay subscriber refunds by failing to provide information that is needed to determine a maximum permitted rate. Since Operators have not justified their Part III allocations and have not calculated an acceptable figure for unbundling equipment and installation costs from programming costs, we must impute an estimated equipment cost figure. We have determined based on the best evidence available to us at this time that Operators' Part II, Worksheet 3, Line 303 entry in each community should be $0.060 of installation and customer equipment costs per subscriber per channel. We have derived this figure by analyzing a sample of other operators' FCC Form 393 filings, including both filings as to which we have already issued orders and filings that are currently under review, and we have observed that generally operators have an average unbundling figure of $0.06 per subscriber per channel.[21] We have further determined that in order to yield an unbundling figure of $0.060 per subscriber per channel, Operators must have incurred more installation and customer equipment costs than they reported, and we have therefore revised their entries on Part II, Worksheet 1, Line 104 and Part II, Worksheet 3, Line 301.[22] While we recognize that this is not an ideal way to determine the correct amount of costs to unbundle and thus to derive a maximum permitted CPS rate, it is the only approach available to us where an operator does not supply sufficient information to justify its price.

e. Because Operators have failed to demonstrate that their prices for the CPS tier were not unreasonable, we will set maximum permitted prices for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which each Operator filed.[23] Except for CUID Nos. CA0241, CA0288, CA0289 and CA1395, Operators on their amended Form 393s calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Operators used in justifying their rates, of 1.030.

f. For CUID Nos. CA0288 and CA0289, TCI Cablevision of Contra Costa County, Inc. ("Contra Costa Operator") on its amended Form 393 calculated the Inflation Adjustment Factor as of the end of December 1993 using data released on December 1, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through December 1993, the base date Contra Costa Operator used in justifying its rate for CUID Nos. CA0288 and CA0289, of 1.034.

g. On its Form 393 filing for CUID Nos. CA0241 and CA1395, Contra Costa Operator calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of December 1993. However, Contra Costa Operator cannot permissibly calculate inflation through the end of December 1993. Based on the service date of the earliest valid complaint, Contra Costa Operator was required to file a rate justification no later than November 15, 1993. If Contra Costa Operator had filed FCC Form 393 by that date, the instructions to Form 393 would have required it to calculate the inflation adjustment only through October 1993.[24] Contra Costa Operator cannot claim an additional inflation adjustment simply because it filed Form 393 late. We therefore must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Operator should have filed Form 393.[25] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Contra Costa Operator should have used in justifying its rate for CUID Nos. CA0241 and CA1395, of 1.030.

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and our calculation of an imputed equipment cost figure is intended to correct for any distortion of Operators' permitted rates that may be caused by this error.

[20] *See* Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-90, 9 FCC Rcd 4316 at 4348, ¶ 90 (1994); Cable Operators' Rate Justification Filings , DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[21] *Cf.* United Video Cablevision, Inc., CUID Nos. MA0333 and MA0334, DA 94-1144, at ¶10 (b) n.24 (Cab. Serv. Bur. released Nov. 9, 1994) (utilizing observed industry average depreciation lives where operator without explanation departed substantially from industry norms in cost-of-service justification).

[22] This adjustment to Worksheet 1 has the effect of causing Operators in some communities to calculate their permitted rate from Form 393, Part II, Worksheet 2 rather than Worksheet 1. For some franchise areas, however, Operators did not complete Worksheet 2 of Form 393. For these franchise areas, therefore, we have computed Worksheet 2 by using data supplied by Operators on their Form 1200 filings.

[23] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[24] FCC Form 393, page 11, instructions for Line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[25] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the periods in question. Operators' showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[26] However, we further determine that for CUID Nos. IL0032 and TX0205 the total overcharge per subscriber is *de minimis*. Therefore, it would not serve the public interest to order a refund in these franchise areas.

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operators shall refund to subscribers in the communities shown in Appendix B, except for CUID Nos. IL0032 and TX0205, that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[27] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operators shall promptly determine the overcharges to their CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operators shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Linex A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[28]

11. IT IS FURTHER ORDERED that Operators shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
CA0099	10/27/93	10/25/93
CA0208	2/23/94	2/24/94
CA0241	9/3/93	8/31/93
CA0288	2/22/94	2/15/94
CA0289	1/10/94	1/4/94
CA0370	2/18/94	2/18/94
CA0416	11/8/93	11/3/93
CA1334	2/24/94	2/25/94
CA1395	9/3/93	8/31/93
CO0263	9/19/93	9/16/93
IA0043	11/8/93	11/2/93
IL0032	2/23/94	2/24/94
IL0040	10/25/93	10/20/93
IL0043	10/4/93	9/29/93
MD0024	2/23/94	2/18/94
TX0087	12/20/93	12/17/93
TX0171	10/26/93	10/23/93
TX0205	2/14/94	2/7/94

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
CA0099	$12.85	$12.53
CA0208	$10.43	$9.64
CA0241	$10.98	$10.42
CA0288	$10.98	$10.47
CA0289	$10.98	$10.47
CA0370	$12.85	$12.13
CA0416	$12.85	$12.13
CA1334	$12.85	$12.13
CA1395	$10.98	$10.42
CO0263	$11.65	$10.85
IA0043	$10.77	$10.60
IL0032	$11.06	$10.97
IL0040	$11.10	$10.42
IL0043	$11.10	$10.42
MD0024	$13.26	$11.68
TX0087	$10.59	$10.18
TX0171	$11.73	$11.29
TX0205	$10.23	$10.12

[26] This finding is based solely on the representations of Operators and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[27] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[28] We reserve the right to make further adjustments to Operators' prices for the period after May 14, 1994, upon completion of our review of Operators' Form 1200 filings.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Post-Newsweek Cable, Inc. CUID No.
CA0019 (Modesto, CA)
CA0670 (Stanislaus, CA)
CA0925 (Burlingame, CA)
IN0189 (Greenwood, IN)
IN0191 (New Whiteland, IN)
TX0024 (Port Lavaca, TX)
TX0095 (Livingston, TX)

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 1995; Released: May 18, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities designated above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on Operator and received by the Commission on the dates set forth on Appendix A. Operator filed FCC Form 393 in response.

5. On November 10, 1993, Operator moved by letter to dismiss the October 13, 1993 complaint in CUID No. CA0670 and the November 1, 1993 complaint in CUID No. CA0019.[11] Operator argues that the complaint in CUID No. CA0019 should be dismissed because the complainant (1) included charges for the basic tier, premium channels, and equipment as well as the CPS tier in response to question 8 of FCC Form 329 as it then existed; (2) included channels on the basic tier as well as the CP tier in response to question 9 on FCC form 329; and (3) incorrectly indicated in response to question 6 that he was complaining about a rate increase after September 1, 1993, rather than the rates in effect on September 1, 1993. Operator argues that the complaint in CUID No. CA0670 should be dismissed for the same reasons and also because the complainant (4) did not include a copy of his bill with the complaint that he sent to Operator; (5) did not indicate the date that he served Operator with a copy of the complaint in response to question 12; and (6) did not state in response to question 13 that he believed the CPS rate was unreasonable. Operator's assertions do not persuade us that the complaints are invalid or should be dismissed. In general, we will find valid any complaint that states a claim on which relief can be granted and provides adequate informa-

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in Operator's prices for the period after May 14, 1994 may be required to reflect the fact that Operator's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator also moved to dismiss several other complaints in CUID Nos. CA0019 and CA0670. These complaints were returned by the Commission pursuant to 47 C.F.R.§ 76.954, and the motions to dismiss were effectively granted by these actions.

tion to allow us to process the complaint, despite minor flaws or inaccuracies. We believe this approach best implements the mandate of the 1992 Cable Act. Because the complainants' responses to question number 9 include channels contained on the CPS tier and because the rates listed in answer number 8 and on the attached bills indicate that the complainants received the CPS tier, we find it reasonable to conclude that the complainants objected to the CPS rates in effect on September 1, 1993 and that they believed those rates were unreasonable. Furthermore, there is no evidence that Operator was hindered in responding to the complaint in CUID No. CA0670 by complainant's failure to include a copy of his bill or to indicate the service date. We therefore find the complaints valid and deny Operator's motions to dismiss the complaints.

6. On January 24, 1994, each of the complainants in CUID No. CA0925 filed a Motion to Strike Post-Newsweek's rate justification for that franchise area on the ground that it was willfully false and deceptive. The complainants noted that in a cover sheet attached to its rate justification, Post-Newsweek stated that for the period prior to September 1, 1993, it had 23 channels on its CPS tier, whereas on Form 393, Part II, Page 2, Line 202, Post-Newsweek claimed 24 channels. The complainants further state that Post-Newsweek should not have counted SportsChannel as a full CPS channel because it is used part of the time to provide pay-per-view services, and therefore that Post-Newsweek should have counted no more than 22.5 CPS channels as of September 30, 1992. For the period since September 1, 1993, the complainants argue that SportsChannel and three other channels should not be counted as full channels on the CPS tier because thay are used part of the time to provide pay-per-view or pay-per-channel services. Therefore, they state that Post-Newsweek should haved counted fewer than 26 channels on the CPS tier on Form 393, Part II, Worksheet 1, Line 102.

7. Post-Newsweek filed an Opposition to Motions to Strike on February 8, 1994. In its opposition, Post-Newsweek explained the discrepancy between its cover sheet and its entry on Line 202 by stating that its cover sheet reported 23 channels immediately prior to September 1, 1993, whereas its Line 202 entry represented 24 CPS channels offered as of September 30, 1992. Post-Newsweek also defended its counting of each of the channels that was used to provide both CPS and premium services as a rate-regulated satellite channel. Post-Newsweek stated that SportsChannel provided rate-regulated services approximately 90 percent of the time that it was in use, and that each of the other channels provided CPS for 12 hours per day and premium services for 12 hours per day.

8. Upon review of the Motions to Strike and Post-Newsweek's opposition, we find that Post-Newsweek has sufficiently explained the apparent discrepancy between its cover memo and its entry on Line 202. We note that Post-Newsweek's claim of 24 CPS channels as of September 30, 1992 is consistent with its channel line-up for that period. Our treatment of Post-Newsweek's split channels is discussed at paragraphs 9d, 9e, and 9f below. Finally, we do not find that Post-Newsweek's statements in its rate justification were willfully false and deceptive. Accordingly, we grant in part and deny in part the Motions to Strike.

9. Operator asserts that its monthly CPS tier prices are justified by its benchmark filings because its prices are equal to or less than the maximum permitted charges as calculated in the filings. Upon review of Operator's Form 393 filings, we have found that it has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Operator did not correctly gross-up its tax entries. By placing entries in these columns, Operator confirms that it is a tax-paying entity (*i.e.*, a "C" corporation). However, Operator incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[12] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly adjusted tax entries.

b. Operator's Form 393, Worksheet 1, Line 104 entries do not represent its current monthly equipment revenue as of the initial date of regulation. Since Operator restructured its rates, including its equipment rates, on September 1, 1993, the monthly equipment revenue figure it entered on Part II, Worksheet 1, Line 104 should have been close or identical to its equipment cost figure on Line 34 of Step G of Part III.[13] However, Operator's entries on these two lines varied substantially. Accordingly, we have changed Line 104 to equal the figure entered on Line 34 in each franchise area, as adjusted pursuant to paragraph 5a, *supra*.

c. In Line 101, Columns A and B of Part II, Worksheet 1 of its FCC Forms 393, Operator used different rates than what appear on the rate cards that operator supplied with its filings. Pursuant to the instructions on Form 393, Operator should have used its actual rates that were in effect on the initial date of regulation. We therefore recalculate line 101,

[12] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also* Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

[13] *See* Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

Columns A and B (and subsequent steps) using the prices for the basic and CPS tiers found in the rate cards.

d. In CUID No. CA0925, Operator's calculations for its rate-regulated package as of September 1, 1993 (Form 393, Part II Worksheet 1) count channels 40, 41, and 42 as rate-regulated satellite channels on the CPS tier. In addition, Operator counts channel 52 (SportsChannel) as a satellite channel on the CPS tier both on Worksheet 1 and in its calculations as of September 30, 1992 on Worksheet 2. According to Operator as of September 1, 1993, channels 40, 41, and 42 each carried a rate-regulated satellite service (CSpan II, ValueVision, and MOR Music, respectively) 12 hours per day and a pay-per-channel service that is not subject to rate regulation (Request 1, Request 2, and Viewer's Choice, respectively) 12 hours per day. Operator further states that as of both time periods SportsChannel carried rate-regulated programming approximately 90 percent of the time and pay-per-view programming approximately 10 percent of the time.

e. Our policy on "split" channels is to categorize them according to their preponderance of use. This policy is based on the fact that the 1992 price survey underlying the benchmark system was analyzed based on whole, not fractional, channel counts. Under the benchmark system in effect prior to May 15, 1994, all channels must be characterized as either rate-regulated or not subject to rate regulation and as either satellite or non-satellite. A "channel" is defined as a "unit of cable service identified and selected by a channel number or similar designation." FCC Form 393, p. 10. The preponderance-of-use test is the only one consistent with this conceptual framework.[14]

f. According to the information provided by Operator, channels 40, 41 and 42 did not provide rate-regulated programming during the majority of programming hours. These channels therefore should not be counted as rate-regulated or as satellite channels on Worksheet 1. Channel 52 (SportsChannel), however, did provide rate-regulated satellite programming during the majority of the programming hours, and it was therefore properly counted. Accordingly, in CUID No. CA0925, we reduce the number of channels on the CPS tier on Form 393, Part I and Form 393, Part II, Worksheet 1, Line 102 from 26 to 23. We also reduce the number of rate-regulated channels used in calculating the benchmark on Form 393, Part II, Worksheet 1, Line 121 from 44 to 41, and we reduce the number of satellite channels in the same calculation from 28 to 25. We do not make any adjustments on Form 393, Part I, Worksheet 2.

g. Because of these errors, we must also recalculate the Inflation Adjustment Factor in each franchise area on Form 393, Part II, Worksheet 1.[15] On its amended Forms 393, Operator calculated the Inflation Adjustment Factor using data it relied on when it set its CPS prices. If based on this data Form 393 indicated that Operator's prices were reasonable, then Operator would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[16] However, Operator has not shown that its prices were reasonable, so we must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Operator should have filed Form 393 in each franchise area.[17] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992, 125.7 for the third quarter of 1993, and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate the Inflation Adjustment Factors set forth in Appendix A.

10. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rates it was charging during the periods in question. Operator's showing justifies the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[18] We further conclude that in CUID No. IN0191 the total overcharge per subscriber is *de minimis*, and therefore it would not serve the public interest to order a refund.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that Operator's Motion to Dismiss the November 1, 1993 complaint in CUID No. CA0019 and the October 13, 1993 complaint in CUID No. CA0670 ARE DENIED.

12. IT IS FURTHER ORDERED that the Motions to Strike Operator's Response in CUID No. CA0925 ARE GRANTED IN PART AND DENIED IN PART AS INDICATED HEREIN.

13. IT IS FURTHER ORDERED that the complaints referred to in Appendix A against the cable programming service prices charged by Operator in the areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

14. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the communities shown in Appendix B except for CUID No. IN0191 that

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[14] *See Viacom Cable, Nashville, Tennessee*, CUID No. TN0148, DA 94-1151, para. 6a-6c (released Nov. 9, 1994).

[15] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[16] Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316, 4348 (1994).

[17] *See* instructions to FCC Form 393, page 11, Line 124 (inflation adjustment is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form"); 47 C.F.R. § 76.956(a) (operator must file a rate justification 30 days of service of a complaint that is not returned by the Commission).

[18] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[19] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

15. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

16. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[20]

17. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served	Inflation Adj. Factor
CA0019	11/01/93	11/01/93	1.032
CA0670	10/19/93	10/13/93	1.030
CA0925	12/14/93	12/07/93	1.034
IN0189	11/02/93	10/29/93	1.030
IN0191	02/25/94	02/25/94	1.039
TX0024	10/08/93	10/05/93	1.030
TX0095	11/16/93	11/11/93	1.032

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
CA0019	$ 9.02	$ 8.92
CA0670	$ 9.02	$ 8.90
CA0925	$13.05	$12.12
IN0189	$ 5.77	$ 5.66
IN0191	$ 5.77	$ 5.71
TX0024	$ 9.21	$ 9.07
TX0095	$10.66	$10.54

[19] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961(b).

[20] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filings.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

New England Cablevision of Massachusetts, Inc.	CUID No. MA0153 (Essex)

Benchmark Filing to Justify Cable Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 1995; Released: May 19, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price New England Cablevision of Massachusetts, Inc. ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaint filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the communitiy referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI of North Kentucky, Inc. CUID No. KY1140 (Danville)

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 1995; Released: May 16, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. In this Order we dismiss complaints against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above on the ground that the complaints concern a rate that is outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon the filing of a valid complaint.[1] Our review reveals that the complaints filed against Operator, while asserting that they challenge a CPS rate, challenge only a rate for basic service, not for CPS. In particular, the record shows that Operator offered only a basic tier of service, and not a CPS tier, in this community. The complaints therefore do not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaints filed prior to May 15, 1994 against the cable programming service price charged by Operator in the community referenced in the caption ARE DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of New England, Inc.	CUID No. MA0135 (North Attleboro)
TCI Cablevision of Waltham, Inc.	CUID No. MA0261 (Waltham)
TCI Cablevision of Ohio, Inc.	CUID Nos. OH0009 (Ashtabula), OH0210 (Niles), OH0244 (Geneva), OH0249 (Middletown), OH0250 (Fairfield), OH0252 (Franklin), OH0598 (Hubbard), OH1611 (Mecca) and OH1981 (North Jackson)
TCI Cablevision of Pasco County, Inc.	CUID Nos. FL0126 (New Port Richey) and FL0721 (Port Richey)
TCI Cablevision of Pinellas County, Inc.	CUID No. FL0482 (Dunedin)
Miami Tele-Communications, Inc.	CUID Nos. FL0530 (Opa Locka) and FL0653 (Miami)
TCI Cablevision of Caspar, Inc.	CUID Nos. WY0011 (Casper) and WY0131 (Bar Nunn)

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 1995; Released: May 16, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the prices the above-captioned operators (collectively "Operators") were charging for their cable programming service ("CPS") tier in the communities referenced above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.,[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operators assert that their monthly CPS prices are justified by their benchmark filings because these prices are equal to or lower than the maximum permitted charges. Upon review, we have found no apparent errors that would result in Operators' actual CPS prices exceeding their maximum permitted CPS prices.[11]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operators implemented their CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operators. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service prices charged by Operators in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Oxford Cable Television, Inc. CUID No. NC0133 (Oxford, NC)

Benchmark Filing to Justify Cable Programming Service Rate

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 1995; Released: May 18, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price Oxford Cable Television, Inc. ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation onbehalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bresnan Communications Company	CUID No. MI0008 (Marquette City)

Benchmark Filing to Justify Cable Programming Service Rate

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 1995; Released: May 16, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price Bresnan Communications Company ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cable Oakland CUID No. CA0589 (Oakland)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 1995; Released: May 16, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the price Lenfest West, Inc. d/b/a Cable Oakland ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaint in the franchise area which is the subject of this Order was completed and served on Operator and received by the Commission on the dates set forth on Appendix A. Operator filed an FCC Form 393 in response; Operator has also filed amended and supplemental Form 393 filings, most recently on April 11, 1995, in response to an inquiry by Commission staff.[11]

5. Operator asserts that its monthly CPS tier price is justified by its benchmark filing because its price is lower than the maximum permitted charge as calculated in the filing. Upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. Operator's Form 393, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Since Operator restructured its rates, including its equipment rates, on September 1, 1993, in an attempt to comply with the Commission's regulations, the monthly equipment cost figure it entered on Line 34 of Step G of Part III should have been close or identical to its Line 104 entry.[12] However, Operator's entries on Line 104 differed substantially from its entries on Line 34. We therefore adjusted Line 104 (and subsequent steps) to equal the amount entered on Line 34.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its prices for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189, n.195.

[11] For example, Operator filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *See* Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

b. In Column G of Schedules A and C of Part III of its FCC Form 393, Operator did not report any income tax expense. Operator is a Subchapter C corporation and is therefore required to pay corporate income tax.[13] By omitting its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore calculated Operator's federal income tax allowance on Column G of Schedules A and C on the basis of a 34% corporate tax rate.[14] Furthermore, the Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (*i.e.*, calculate the tax as a percentage of return on investment plus tax).[15] In accordance with this principle, we calculated Column G of Schedules A and C (and subsequent steps) using a grossed-up federal income tax rate of 51.51% of Operator's return on investment.

c. Operator's calculations for its rate-regulated package as of the initial date of regulation (Form 393, Part I, and Form 393, Part II, Worksheet 1) are based on a channel count of 22 channels on the basic service tier and 28 channels on the CPS tier. Our examination of the channel line-up card provided by Operator in its amended filings, however, reveals that Operator offered 24 channels on the basic tier and 26 channels on the CPS tier. We therefore adjusted Operator's calculations to reflect the correct number of channels on each tier.

d. On Line 108 of Form 393, Part II, Worksheet 1, Operator incorrectly entered a franchise fee exceeding the 5% assessed by the local franchising authority.[16] We therefore adjusted Line 108 (and subsequent steps) to reflect the fact that the local franchising authority was actually charging the maximum allowance of 5%.

e. Because of these errors, we conclude that Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, on the basis of the most accurate data currently available for the date as to which Operator filed.[17] On its amended Form 393, Operator calculated the Inflation Adjustment Factor as of the end of February 1994 using data released on March 31, 1994. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through February 1994, the base date Operator used in justifying its rates, of 1.039.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator's showing supports the maximum reasonable CPS tier price shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint (as set forth in Appendix A) to May 14, 1994.[18] However, we further determine that the refund at issue is such a *de minimis* amount that it would not serve the public interest to order a refund.

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaint referred to in Appendix A against the cable programming service price charged by Operator in the area referenced above, and all other complaints in this franchise area related to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
CA0589	2/22/94	2/14/94

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
CA0589	$10.96	$10.92

[13] *See* letter of confirmation from FCC to Robert Mohollen, VP & Controller, Lenfest Group (April 27, 1995).

[14] *Id.*

[15] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that it has a state or federal income tax obligation."). *See also* Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.").

[16] *See* letter from Robert Mohollen, VP & Controller, Lenfest Group, to FCC (April 11, 1995).

[17] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[18] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Clear	CUID Nos. MI0498 (Saline, MI)
Cablevision, Inc.	MI0499 (Manchester, MI)
	MI0500 (Dexter, MI)
	MI0501 (Clinton, MI)
	MI0502 (Chelsea, MI)
	MI0503 (Milan, MI)

Benchmark Filings to Justify Cable Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 1995; Released: May 18, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the prices Clear Cablevision, Inc. ("Operator") was charging for its cable programming service ("CPS") tiers in the communities referenced above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS prices are justified by its benchmark filings because these prices are less than the maximum permitted charges. Upon review, we have found no apparent errors that would result in Operator's actual CPS prices exceeding its maximum permitted CPS prices.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service prices charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Coaxial	CUID Nos. OH0170 (Columbus, OH)
Communications, Inc.	OH0747 (Pickerton, OH)
	OH1662 (Westerville, OH)
	OH2269 (Fairfield, OH)

Benchmark Filings to Justify Cable
Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 1995; Released: May 18, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the prices Coaxial Communications, Inc. ("Operator") was charging for its cable programming service ("CPS") tiers in the communities referenced above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS prices are justified by its benchmark filings because these prices are less than the maximum permitted charges. Upon review, we have found no apparent errors that would result in Operator's actual CPS prices exceeding its maximum permitted CPS prices.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service prices charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 11, 1995

Released: May 16, 1995

Mr. Arthur J. Kraus
Seneca Cable T.V.
305 State Street
P.O. Box 11
Manhattan, IL 60442

IN REPLY REFER TO:
DA 95-1089

Dear Mr. Kraus:

This letter is in reference to the letter you filed on May 8, 1995 with respect to a complaint filed February 24, 1994, against the price Seneca Cable T.V. ("Seneca Cable") was charging for cable programming service in Seneca, Illinois, CUID No. IL0204. In that letter, you state that Seneca Cable's Seneca, Illinois system had 893 subscribers at the initial date of regulation. Based on the information you have provided, it appears that the Seneca, Illinois system qualifies as a "small system" pursuant to 47 C.F.R. § 76.901(c), and was therefore exempt from rate regulation until May 15, 1994.

We will rule at a later date on Seneca Cable's justification under the Commission's revised rate regulations of its cable programming service rates in Seneca, Illinois beginning May 15, 1994.

Should you have any questions regarding this matter, please contact Peter G. Wolfe at (202) 739-0783.

Sincerely,

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

cc: Andrew T. Freund, Esq.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Cable TV Investors 4, Ltd.	CUID Nos. HI0023 (Captain Cook), HI0024 (Waikoloa), HI0025 (Kawakhae-Puako), HI0026 (Honaunau), HI0027 (Kealaklekua), HI0028 (Holualoa), HI0029 (Kailua-Kona), HI0030 (Kamuela), HI0031 (Keauhou), HI0032 (Kalaoa), HI0056 (Mauna Lani), HI0075 (Mauna Kea), HI0078 (Hawaii) and HI0093 (Waikoloa Resort)
TCI Cablevision of Ohio, Inc.	CUID No. OH0187 (Columbiana)

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: May 16, 1995; Released: May 19, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (individually "Operator" and, collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on the respective Operators and received by the Commission on the dates set forth on Appendix A. Operators filed FCC Form 393s in response; Operators have also filed amended and supplemental Form 393 filings.[11]

5. Operators' actual CPS tier prices were above the maximum permitted prices that Operators calculated for the CPS tier and, thus, Operators failed to demonstrate that their prices for the CPS tier were not unreasonable. Furthermore, upon review of Operator's submission for the franchise areas located in the Hawaii islands, we have found that in every case Operator miscalculated its maximum permitted price, and it is therefore appropriate to make the following adjustment to Operator's calculations in its Form 393:

> On its Form 393 filing, Operator calculated the Inflation Adjustment Factor as of the end of March 1994. However, Operator cannot permissibly calculate inflation through the end of March 1994. Based on the

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operators implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in prices for the period after May 14, 1994 may be required to reflect the fact that the prices during the earlier period, which are used as the starting point to calculate the prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operators filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

service date of the earliest valid complaint, Operator was required to file a rate justification no later than March 30, 1994.[12] If Operator had filed FCC Form 393 by that date, the instructions to Form 393 would have required it to calculate the inflation adjustment only through February 1994.[13] Operator cannot claim an additional inflation adjustment simply because it filed Form 393 late. We therefore must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Operator should have filed Form 393.[14] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, wecalculate an Inflation Adjustment Factor through February 1994, the base date Operator should have used in justifying its rate, of 1.039.

6. For CUID No. OH0187, we have found no apparent errors in Operator's calculation of its maximum permitted rate. However, Operator's actual CPS tier price was above the maximum permitted price that Operator calculated for the CPS tier. Accordingly, Operator has failed to demonstrate that its price for the CPS tier was not unreasonable, and we therefore must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which Operator filed:[15]

Operator on its amended Form 393 calculated the Inflation Adjustment Factor as of the end of March 1994 using data released on March 31, 1994. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 127.5 for the first quarter of 1994. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through March 1994, the base date Operator used in justifying its rate, of 1.043.

7. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the periods in question. Operators' showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[16] However, we further determine that for each franchise area the total overcharge per subscriber is *de minimis*. Therefore, it would not serve the public interest to order a refund.

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the franchise areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operators shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the franchise areas listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[17]

10. IT IS FURTHER ORDERED that Operators shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
HI0023	2/28/94	2/25/94
HI0024	2/28/94	2/25/94
HI0025	2/28/94	2/25/94
HI0026	2/28/94	2/25/94
HI0027	2/28/94	2/25/94
HI0028	2/28/94	2/25/94
HI0029	2/28/94	2/25/94
HI0030	2/28/94	2/25/94
HI0031	2/28/94	2/25/94
HI0032	2/28/94	2/25/94
HI0056	2/28/94	2/25/94
HI0075	2/28/94	2/25/94
HI0078	2/28/94	2/25/94
HI0093	2/28/94	2/25/94
OH0187	4/18/94	4/18/94

[12] *See* 47 C.F.R. § 76.956(a).

[13] FCC Form 393, page 11, instructions for Line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[14] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of the analysis).

[15] *Id.*

[16] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[17] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filings.

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
HI0023	$10.76	$10.66
HI0024	$10.76	$10.66
HI0025	$10.76	$10.66
HI0026	$10.76	$10.66
HI0027	$10.76	$10.66
HI0028	$10.76	$10.66
HI0029	$10.76	$10.66
HI0030	$10.76	$10.66
HI0031	$10.76	$10.66
HI0032	$10.76	$10.66
HI0056	$10.76	$10.66
HI0075	$10.76	$10.66
HI0078	$10.76	$10.66
HI0093	$10.76	$10.66
OH0187	$11.88	$11.41

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI of Southern Iowa, Inc.	CUID No. IA0082 (Washington)
TCI of Northern Iowa, Inc.	CUID No. IA0108 (Cedar Falls)
TCI of the Heartlands, Inc.	CUID No. IA0511 (Dallas Center)
TCI Cablevision of Pennsylvania, Inc.	CUID Nos. PA0026 (Lock Haven), PA0120 (Barnesboro), PA0122 (East Carroll), PA0168 (State College), and PA0816 (Cambria)

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: May 16, 1995; Released: May 19, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (individually "Operator" and, collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on the respective Operators and received by the Commission on the dates set forth on Appendix A. Operators filed FCC Form 393s in response; Operators have also filed amended and supplemental Form 393 filings, most recently on May 31, 1994 for CUID Nos. IA0082, IA0108, and IA0511, and June 24, 1994 for CUID Nos. PA0026, PA0168, PA0122, PA0816, and PA0120.[11]

5. For two of the communities at issue in this Order, Operator's actual CPS tier price was above the maximum permitted price that it calculated for the CPS tier and, thus, Operator failed to demonstrate that its price for the CPS tier was not unreasonable. For the other communities, Operators' prices were at or below their calculated maximum permitted prices. Furthermore, upon review of Operators' submissions, we have found that in every case they miscalculated their maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operators' calculations in their Form 393s:

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operators implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in prices for the period after May 14, 1994 may be required to reflect the fact that the prices during the earlier period, which are used as the starting point to calculate the prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operators filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

a. The 1992 Cable Act requires operators to fully unbundle equipment and installation costs from programming costs.[12] The Commission's regulations implement Congress's directive by requiring operators to establish an equipment basket.[13] Section 76.923(c) of the Commission's regulations specifically states that equipment basket costs shall include "the direct and indirect material and labor costs of providing, leasing, installing, repairing, and servicing customer equipment." In its Order adopting rate regulations, the Commission amplified this regulation by stating that "[t]he basket will include an allocation of all those system joint and common costs that service installation, leasing, and equipment repair share with other system activities, excluding general system overhead."[14] When completed correctly, Part III of FCC Form 393 unbundles equipment costs from programming costs.

b. Operators, however, have not properly completed Part III of their FCC Form 393s and thus have not completely unbundled equipment and installation costs from programming costs as directed by the 1992 Cable Act and the Commission's regulations. Specifically, on Schedule A of Part III, Operators have not reported any maintenance facility cost for installations and service of customer leased equipment, and on Schedule B they have not reported any costs for utilities. The lack of maintenance facility and utility costs might be correct if Operators' Schedule B allocations reflected that contract or third-party labor was performing all equipment installations and repairs. The allocations that Operators make in their Schedule B Analyses, however, indicate that their own employees performed customer equipment installation and maintenance.

c. Not only are Operators' Schedule B allocations inconsistent with not having any maintenance facility costs, their allocations are also inconsistent with the argument that the repair of converters and remotes was performed off-premises by a third party. Operators have included on Schedule B and their Schedule B Analyses entries for contract labor and "Converter Maintenance." These entries, however, further indicate that Operators have not fully unbundled their equipment costs from their regulated service costs. In their Part III, Step C, Line 9 explanations, Operators set forth the number of hours that they devoted to maintenance and service of remotes and converters.[15] If Operators' contract labor and converter maintenance entries are added together and the sum is divided by the number of reported hours for converter and remote maintenance, the resulting cost per hour in these communities ranges from $0.39 to $14.59. Moreover, this calculation overstates Operators' reported labor costs because it ignores that some portion of the converter maintenance cost must be for supplies. We have recognized that it is not unreasonable to assume that operators should incur a contract labor charge of $25.00 per hour for the service and maintenance of remotes and converters.[16] Not only are Operators' reported labor costs for the service and maintenance of remotes and converters substantially below this figure, they are also well below their own hourly service charge as calculated on Line 5, Step A, Part III of their Form 393s.[17] Thus, Operators' contract labor cost added to their Converter Maintenance cost cannot represent all of Operators' converter maintenance costs, and there must remain costs related to installations and service of customer leased equipment that Operators have not included on Form 393, Part III.[18]

d. Operators have not justified their Part III allocations. The Commission has repeatedly stated that where an operator does not provide adequate information to justify its rate, the Commission will set the maximum permitted rate based on the best evidence available to it.[19] Simply put, Operators cannot be permitted to delay subscriber refunds by failing to provide information that is needed to determine a maximum permitted rate. Since Operators have not justified their Part III allocations and have not calculated an acceptable figure for unbundling equipment and installation costs from programming costs, we must impute an estimated equipment cost figure. We have determined based on the best evidence available to us at this time that Operators' Part II, Worksheet 3, Line 303 entry in each community should be $0.060 of installation and customer equipment costs per subscriber per channel. We have derived this figure by analyzing a sample of other operators' FCC Form 393 filings, including both filings as to which we have already issued orders and filings that are currently under review, and we have observed that generally operators have an average unbundling figure of $0.06 per subscriber per channel.[20] We have further determined that in order to

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[12] 47 U.S.C. § 543(b)(3).

[13] 47 C.F.R. § 76.923(b).

[14] Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 at 5815, ¶ 295 (1993) (footnote omitted). *See also* First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164 at 1190, ¶ 47 (1993).

[15] *See also* Operators' FCC Form 393s at Part III, Line 9 and Line 16.

[16] *See* Harron Communications Corp. v. Commonwealth of Massachusetts Community Antenna Television Commission, CUID Nos. MA0225, MA0247, MA0229, MA0228, MA0245, MA0224, MA0246, DA 95-160, at ¶ ¶19-20 (Cab. Serv. Bur., released Feb. 7, 1995).

[17] Operators' calculated hourly service charge in these communities ranges from $20.81 to $26.16.

[18] If, as in other communities, Operators are charging a wire maintenance fee, we would expect to see these costs reflected in Operators' rate justification filings. The absence of these costs would provide additional evidence that Operators have not fully unbundled their equipment costs from their programming costs, and our calculation of an imputed equipment cost figure is intended to correct for any distortion of Operators' permitted rates that may be caused by this error.

[19] *See* Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-90, 9 FCC Rcd 4316 at 4348, ¶ 90 (1994); Cable Operators' Rate Justification Filings, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[20] *Cf.* United Video Cablevision, Inc., CUID Nos. MA0333 and MA0334, DA 94-1144, at ¶10 (b) n.24 (Cab. Serv. Bur. released Nov. 9, 1994) (utilizing observed industry average depreciation lives where operator without explanation departed substantially from industry norms in cost-of-service justification).

yield an unbundling figure of $0.060 per subscriber per channel, Operators must have incurred more installation and customer equipment costs than they reported, and we have therefore revised their entries on Part II, Worksheet 1, Line 104 and Part II, Worksheet 3, Line 301.[21] While we recognize that this is not an ideal way to determine the correct amount of costs to unbundle and thus to derive a maximum permitted CPS rate, it is the only approach available to us where an operator does not supply sufficient information to justify its price.

e. Because Operators have failed to demonstrate that their prices for the CPS tier were not unreasonable, we will set maximum permitted prices for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which each Operator filed.[22] On their amended Form 393s, Operators calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Operators used in justifying their rates, of 1.030.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the periods in question. Operators' showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[23] However, we further determine that for CUID No. PA0026 the total overcharge per subscriber is *de minimis*. Therefore, it would not serve the public interest to order a refund in this franchise area.

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operators shall refund to subscribers in the communities shown in Appendix B, except for CUID No. PA0026, that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[24] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operators shall promptly determine the overcharges to their CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operators shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[25]

11. IT IS FURTHER ORDERED that Operators shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[21] This adjustment to Worksheet 1 has the effect of causing Operators in some communities to calculate their permitted rate from Form 393, Part II, Worksheet 2 rather than Worksheet 1. For CUID Nos. IA0082, PA0168, PA0122, PA0816, and PA0120, however, Operator did not complete Worksheet 2 of Form 393. For these franchise areas, therefore, we have computed Worksheet 2 by using data supplied by Operator on its Form 1200 filing.

[22] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[23] This finding is based solely on the representations of Operators and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[24] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[25] We reserve the right to make further adjustments to Operators' prices for the period after May 14, 1994, upon completion of our review of Operators' Form 1200 filings.

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
IA0082	1/10/94	12/31/93
IA0108	12/16/93	11/30/93
IA0511	11/16/93	11/12/93
PA0026	10/15/93	10/12/93
PA0120	12/17/93	12/15/93
PA0122	10/8/93	10/5/93
PA0168	10/29/93	10/21/93
PA0816	10/12/93	10/6/93

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
IA0082	$11.28	$10.65
IA0108	$14.86	$13.22
IA0511	$ 9.86	$ 9.64
PA0026	$ 9.94	$ 9.92
PA0120	$12.07	$11.21
PA0122	$12.07	$11.21
PA0168	$11.56	$11.05
PA0816	$12.07	$11.21

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cablevision of Lake Travis — CUID No. TX0323 (Austin)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: May 16, 1995; Released: May 19, 1995

By the Chief, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS price upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS price.[3] Under our rules, an operator may attempt to justify its price through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS price are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS price were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their price were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their price for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their price for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The complaint in the franchise area of Austin, Texas was completed and served on Operator on October 8, 1993 and received by the Commission on October 12, 1993. Operator filed FCC FormP 393 in response on November 15, 1993.

5. In its benchmark filing of November 15, 1993, Operator calculated a maximum permitted price for the CPS tier of $15.29 per month (plus franchise fee). However, Operator's actual price for the CPS tier was $16.30 per month (plus franchise fee). Thus, Operator has failed to demonstate that its price for the CPS tier was not unreasonable. Furthermore, upon review of Operator's submission we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Operator did not correctly account for its income tax expense. Operator is a Subchapter C corporation and is therefore required to pay corporate income tax.[11] By omitting its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculated Operator's Federal income tax allowance on Column G of Schedules A and C on the basis of a 34% corporate tax rate.[12] Furthermore, the Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (*i.e.*, calculate the tax as a percentage of return on investment plus tax).[13] In accordance with this principle, we recalculated Col-

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *See* Operator's filing on FCC Form 1205, page 1.

[12] *Id.*

[13] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax- paying business entities to the extent that they have a state or federal income tax obligation."). *See also* Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.").

umn G of Schedules A and C (and subsequent steps) using a grossed-up federal income tax rate of 51.51% of Operator's return on investment.

b. Since Operator has failed to demonstrate that its price for the CPS tier was not unreasonable, we must recalculate the Inflation Adjustment Factor on Form 393, Part II, Worksheet 1 on the basis of the most accurate data currently available for the date for which Operator filed.[14] On its FCC Form 393, Operator calculated its Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the United States Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date operator used in justifying its rate, of 1.030.

c. In its filing, Operator entered $7.95 for the CPS tier as its monthly rate as of September 30, 1992 on Form 393, Part II, Worksheet 2, Line 201(B). However, Operator's rate card from that time period indicates that its actual monthly rate, exclusive of franchise fees, was $9.50 for the CPS tier. The instructions to Form 393 require the operator to enter on Line 201 its actual monthly charge for the basic service tier and for each tier of cable programming service that was offered to subscribers in the franchise area as of September 30, 1992. We have therefore corrected Line 201 to match the figure on Operator's rate card.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies the maximum reasonable CPS tier price of $15.92 per month (plus franchise fee) for the period from October 12, 1993 to May 14, 1994.[15]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaint against the cable programming service price charged by Operator in Austin, Texas IS GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in Austin, Texas that portion of the amounts paid for cable programming service for the period from October 12, 1993[16] to May 14, 1994 which exceeded the maximum price of $15.92 per month (plus franchise fee), plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Austin, Texas, for the period beginning May 15, 1994, to reduce the monthly charge as of March 31, 1994 for Tier 2, (line A6b) to equal $15.92 (plus franchise fee).[17]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[14] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[15] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[16] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[17] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Transmittal Nos. 270, 289
Tariff F.C.C. No. 1

ORDER

Adopted: May 12, 1995; Released: May 12, 1995

By the Chief, Tariff Division, Common Carrier Bureau:

1. On March 1, 1995, BellSouth filed Transmittal No. 270 to introduce a new service offering, called "Data Gathering Through Customer Account Record Exchange" (Data Gathering Through CARE). Transmittal No. 270 is scheduled to become effective on May 15, 1995. This service would furnish interexchange carriers (IXCs) and resellers all of the working telephone numbers, terminal numbers, name and address, and related subscription information associated with a BellSouth subscriber's billing telephone number (BTN). D&J at 1. The service provides a means for IXCs and resellers to obtain information directly from BellSouth for all numbers associated with a multi-line subscriber's BTN without burdening the subscriber to obtain and provide this information. The information received by the IXCs or resellers can then be used for inclusion in the submission of Primary Interexchange Carrier (PIC) change orders. *Id.* The service is only available to IXCs and resellers for end user customers for whom they have a valid Letter of Authorization (LOA) on file and is restricted to IXCs or resellers for the purpose of establishing and maintaining services for end users who have requested such service from the IXC or reseller. *Id.* at 2-3. The information provided through Data Gathering Through Care cannot be resold or otherwise provided to any other party for any purpose. *Id.*

2. On March 16, 1995, MCI Telecommunications Corp. (MCI) filed a petition to reject or suspend and investigate Transmittal No. 270, to which BellSouth replied on March 24, 1995. MCI claims that the plan is unlawfully restrictive because it conflicts with the Commission's rules[1] and the *PIC Change Report and Order*.[2] MCI argues that because the Commission's rules allow methods other than an LOA to be used for PIC changes, it is unreasonable to restrict the flow of information about PIC changes to cases in which there is a signed LOA. MCI Petition at 3-4. MCI also claims that BellSouth has filed insufficient cost support for its rate for the new service. *Id.* at 5-9.

3. In its reply, BellSouth acknowledges that Commission rules prescribe several methods for obtaining PIC change authorization, and agreed to file tariff revisions to clarify that IXCs and resellers may obtain end user authorization in any manner consistent with Commission Rules in order to receive the benefits of the proposed service. BellSouth Reply at 2-3. BellSouth subsequently filed Transmittal No. 289 to revise the tariff.[3] Concerning the cost support issues, BellSouth claims that MCI's objections are without merit.[4] BellSouth states that the rate structure adopted for Data Gathering Through CARE reflects the direct costs of the service plus a reasonable contribution to general overhead, which is consistent with the statutory requirements of "just and reasonable rates." *Id.* at 4.

4. The Tariff Division has reviewed BellSouth's Transmittal No. 270 and the related pleadings. We conclude that BellSouth's filing is not patently unlawful so as to warrant rejection and that an investigation is not warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate BellSouth's revisions to Tariff F.C.C. No. 1, Transmittal No. 270, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Chief, Tariff Division
Common Carrier Bureau

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[1] *See* 47 C.F.R. § 64.1100.

[2] *See* Policies and Rules Concerning Changing Long Distance Carriers, CC Docket No. 91-64, Report and Order, 7 FCC Rcd 1038 (1992) (*PIC Change Report and Order*).

[3] *See* BellSouth Transmittal No. 289, filed May 12, 1995.

[4] In support of its tariff filing, BellSouth also filed a letter explaining the rates for Data Gathering Through CARE. Letter from W.W. Jordan, BellSouth Executive Director - Federal Regulatory, to Geraldine Matise, Chief, Tariff Division, Common Carrier Bureau, May 3, 1995.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 12, 1995

BELL ATLANTIC TELEPHONE COMPANIES
BELLSOUTH TELECOMMUNICATIONS, INC
GTE SERVICE CORPORATION
SOUTHWESTERN BELL TELEPHONE COMPANY
US WEST COMMUNICATIONS, INC AND
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION
FILE APPLICATIONS FOR REVIEW OF
RESPONSIBLE ACCOUNTING OFFICER LETTER 25

PUBLIC COMMENTS INVITED

On May 3, 1995, Bell Atlantic Telephone Companies ("Bell Atlantic"), BellSouth Telecommunications, Inc. ("BellSouth"), GTE Service Corporation ("GTE"), Southwestern Bell Telephone Company ("Southwestern"), US West Communications, Inc. ("US West") and National Telephone Cooperative Association ("NTCA") filed with the Commission separate Applications for Review of Responsible Accounting Officer Letter No. 25 (RAO Letter 25), which was issued by the Common Carrier Bureau under delegated authority on April 3, 1995 (DA 95-703). RAO Letter 25 provides guidance on video dialtone accounting to local exchange carriers that receive Section 214 authorizations to provide video dialtone service. It sets forth specific guidance on the requirements for accounting classifications, subsidiary records, and amendments to cost allocation manuals ("CAMs") for LECs that provide video dialtone service.

Bell Atlantic, BellSouth, Southwestern Bell and US West state that RAO Letter 25 exceeds the scope of the Bureau's delegated authority. Bell Atlantic, GTE, Southwestern Bell, BellSouth and US West contend that RAO Letter 25 creates a new product-specific or cost-of-service type of accounting system that is contrary to the Commission's existing Part 32 rules and that it is too costly to implement. BellSouth and Southwestern Bell state that RAO Letter 25 incorrectly classified the asynchronous transfer mode ("ATM") equipment as circuit equipment. BellSouth, GTE and US West also claim that the CAM revisions required by RAO Letter 25 are unnecessary. In addition, GTE also states that RAO Letter 25 conflicts with FCC rules and policies for retirement of investments and depreciation and income tax calculations. All petitioners request the Commission to revise or modify the RAO Letter 25. Finally, BellSouth and NTCA request the Commission to rescind the letter.

Ex Parte Rules - Non Restricted Proceeding. This is a non-restricted notice and comment rulemaking proceeding. *Ex Parte* presentations are permitted, provided that they are disclosed as provided in Commission Rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.106(a).

Parties may file comments on the Applications for Review no later than **May 30, 1995**. Replies should be filed by **June 9, 1995**. Comments should reference AAD 95-68. A copy of each pleading should be sent to Kenneth Ackerman and Daniel Gonzalez, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and the International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies of the Applications for Review and any comments will be available for public inspection and copy in the Accounting and Audits public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITC. For further information contact Kenneth Ackerman, or Daniel Gonzalez (202) 418-0810.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D. C. 20554

MM Docket No. 95-31

In the Matter of

Reexamination of the Comparative
Standards for New Noncommercial
Educational Applicants

ORDER GRANTING EXTENSION OF TIME FOR FILING REPLY COMMENTS

Adopted: May 31, 1995 Released: May 31, 1995

By the Chief, Mass Media Bureau:

1. On March 17, 1995, the Commission released a Notice of Proposed Rulemaking ("Notice"), FCC 95-79, 60 Fed. Reg. 15,527 (March 24, 1995) in this proceeding, inviting additional comments relating to possible modification of the criteria currently used to select among competing applicants for new noncommercial educational ("NCE") broadcast facilities. The deadline for filing comments currently is May 15, 1995, and the deadline for filing reply comments is May 31, 1995.

2. On May 30, 1995, a joint request for extension of time for filing comments and reply comments was filed by The Association of America's Public Television Stations and National Public Radio (the "Joint Petitioners"). The joint request asks that the reply deadline be extended by one week until June 7, 1995.

3. The Joint Petitioners state that the additional time is required because of "the press of other business, including the filing of a substantial motion for summary judgment" in the remanded must-carry case. Joint Request, at 1. Grant of the extension request will enable the Joint Petitioners to present the Commission with responses to their proposed criteria and possible areas of compromise. This, they claim, will materially facilitate the resolution of this proceeding and will not prejudice the interests of any other party.

4. As set forth in Section 1.46 of the Commission's Rules, 47 C.F.R. §1.46, it is our policy that extensions of time for filing comments in rulemaking proceedings will not be granted routinely. This is especially the case where, as here, the Commission has established short comment and reply periods due to its desire to resolve the questions presented expeditiously. See Notice at ¶ 1. However, under the circumstances described above, we believe that the requested extension of time to file comments and reply comments is warranted. Substantial agreement between the interested and affected parties will facilitate resolution of the issues raised in the Notice, and thus it appears reasonable to provide the commenting parties with additional time to address these issues.

5. Accordingly, IT IS ORDERED, that the Joint Request for Extension of Time filed by the Joint Petitioners IS GRANTED, and the time for filing reply comments IS EXTENDED to **June 7, 1995**.

6. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 303(r), and Sections 0.204(b), 0.283, and 1.45 of the Commission's Rules, 47 C.F.R. §§0.204(b), 0.283, and 1.45.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Multimedia Cablevision, Inc. CUID Nos. OK0059, Stillwater; OK0094, Warr Acres; OK0103, Chickasha; OK0108, Norman; OK0115, Yukon; OK0138, Edmond; OK0143, Moore; OK0146, Midwest City; OK0154, Del City; OK0170, Bethany; OK0171, Nichols Hills; OK0180, Mustang; OK0181, The Village; OK0389, Choctaw.

Benchmark Filings to Justify Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: May 18, 1995; Released: May 24, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices Multimedia Cablevision, Inc. ("Multimedia") was charging for its cable programming service ("CPS") tier in the communities referenced above. Multimedia has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Multimedia's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The first complete and timely complaints for each of the franchise areas addressed in this Order were served on Multimedia and received by the Commission on the dates set forth in the Attachment.

5. Multimedia responded to the complaints in CUID Nos. OK0094, OK0103, OK0108, OK0146, OK0171, and OK0180 by filing motions to dismiss on the grounds that Multimedia did not offer a cable programming service tier in these communities and was therefore not subject to rate regulation by the Commission. Specifically, Multimedia argued that its seven-channel a la carte package was not subject to rate regulation, and that it offered no other CPS tier. Multimedia did not initially respond to the complaints in the other communities addressed in this Order. Subsequently, the Commission requested that Multimedia file either a Form 393 or a cost-of-service showing including its a la carte package as a rate-regulated tier for all the communities addressed herein.[11] Multimedia attempted to justify its CPS prices through FCC Forms 393 filed on March 22, 1995.

DISCUSSION

6. Multimedia states that it restructured its service offerings in each of the communities addressed in this Order on September 1, 1993 and began offering seven channels on an individual, or a la carte, basis. Multimedia asserts that these a la carte channels could also be pur-

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Multimedia has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Multimedia implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Letters from Zenji Nakazawa, FCC, to David P. Fleming, Vice President, Multimedia Cablevision, Inc. (Feb. 7, 1995 and March 8, 1995).

chased collectively as one seven-channel package (Value Pack). All of the channels were previously offered either on Multimedia's basic or CPS tier. At about the same time, Multimedia moved the other channels that had previously been offered on its CPS tier into its basic tier. A similar restructuring was addressed in our letter of inquiry ("LOI") order released on December 22, 1994, in which we resolved the regulatory status of an a la carte package offered by Falcon Cablevision ("Falcon") in Southern Shores, North Carolina.[12] In the LOI order, we found that the retiering constituted an evasion of rate regulation. We concluded that Falcon's a la carte package must be treated as a rate-regulated cable programming service tier and that the channels composing it must be counted as rate-regulated channels as of September 1, 1993, for purposes of completing the rate justification forms. There are no facts in the record of this proceeding that materially distinguish Multimedia's offering from Falcon's package. We will therefore treat Value Pack as a rate-regulated CPS tier and deny Multimedia's motions to dismiss.

7. Multimedia asserts that its monthly CPS prices are justified by its benchmark filings because these prices are less than the maximum permitted charges as calculated in the filings. Upon review, we have found no apparent errors that would result in Multimedia's prices for its Value Pack tier exceeding the maximum permitted prices.[13]

CONCLUSIONS

8. Upon review of the record herein, we conclude that, for the period from the date the Commission received the earliest complaint for each of the subject communities set forth in the Attachment to May 14, 1994, Multimedia's showing supports as reasonable its CPS tier prices per month (plus franchise fee) as set forth in the Attachment for the Value Pack.

9. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that Multimedia's motions to dismiss the complaints against its cable programming service prices in CUID Nos. OK0094, OK0103, OK0108, OK0146, OK0171, and OK0180 ARE DENIED.

10. IT IS FURTHER ORDERED that the complaints referenced herein against the cable programming service prices charged by Multimedia Cablevision, Inc. of Oklahoma in the communities referenced above, and all other complaints in these franchise areas related to the same prices, ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Attachment

CUID No.	COMMUNITY	DATE SERVED (on (with FCC) Multimedia)	DATE FILED	VALUE-PACK
OK0059	Stillwater	10/27/93	11/1/93	$3.88
OK0094	Warr Acres	2/17/94	2/23/94	$2.41
OK0103	Chickasha	3/30/94	4/4/94	$3.48
OK0108	Norman	10/12/93	10/18/93	$2.89
OK0115	Yukon	10/18/93	10/26/93	$2.50
OK0138	Edmond	10/1/93	10/8/93	$3.67
OK0143	Moore	10/7/93	10/12/93	$2.61
OK0146	Midwest City	9/17/93	9/22/93	$3.43
OK0154	Del City	10/13/93	10/20/93	$2.24
OK0170	Bethany	10/13/93	10/18/93	$2.41
OK0171	Nichols Hills	9/14/93	9/20/93	$3.67
OK0180	Mustang	10/21/93	10/20/93	$2.59
OK0181	The Village	10/19/93	10/23/93	$3.67
OK0389	Choctaw	2/28/94	2/28/94	$3.22

[12] Falcon Cablevision, Southern Shores, North Carolina, LOI-94-2, DA 94-1551 (Cab. Serv. Bur., released Dec. 22, 1994). In that case, Falcon created an a la carte package which consisted of ten channels, eight of which were offered on rate-regulated tiers before September 1, 1993.

[13] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 19, 1995

NECA Files Supplemental Comments to Petition for Rulemaking to Allow for Incentive Settlement Options for NECA Pool Companies - RM 8389

Pleading Cycle Established

COMMENTS: June 19, 1995
REPLY COMMENTS: July 5, 1995

In 1993, the National Exchange Carrier Association, Inc. (NECA) filed a petition for rulemaking which proposed rule revisions to allow it to offer incentive settlement options within the NECA pools.[1] On May 15, 1995, NECA filed supplemental comments to its 1993 petition which seek to replace the "Profit Sharing Incentive Option" proposed in its 1993 petition with a "Customer Dividend Option." NECA also filed on May 15, 1995, a motion to accept its supplemental comments.

NECA states that the Customer Dividend Option proposed in its supplemental comments is like its originally filed Profit Sharing Incentive Option in a number of ways. NECA believes that a sound record has been established in this proceeding for the Commission to combine its newly proposed Customer Dividend Option with its prior proposals in its petition for rulemaking. It further states that ultimate adoption of incentive options for NECA pool members will allow NECA small company members and their customers to enjoy the benefits and challenges of incentive regulation that the Commission has previously adopted for those companies that are no longer NECA pool members.

Interested parties may file comments on NECA's supplemental comments and its motion no later than **June 19, 1995**. Replies to the comments may be filed no later than **July 5, 1995**.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington D.C. 20554.

For further information, contact Gregory Cooke, Common Carrier Bureau, (202) 418-1530.

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[1] The National Exchange Carrier Association Inc. Proposed Revision of Part 69 of the Commission's Rules to Allow for Incentive Settlement Options for NECA Pool Companies, RM 8389, filed Nov. 5, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-48

In the Matter of

Policies and Rules Concerning
Children's Television Programming

Revision of Programming Policies
for Television Broadcast Stations

ORDER GRANTING EXTENSION OF TIME FOR FILING COMMENTS AND REPLY COMMENTS

Adopted: June 1, 1995; Released: June 1, 1995

By the Chief, Mass Media Bureau

Comment Date: September 14, 1995
Reply Comment Date: October 16, 1995

1. On April 5, 1995, the Commission adopted a *Notice of Proposed Rule Making* seeking comment on proposals to amend the Commission's rules implementing the Children's Television Act of 1990. *Notice of Proposed Rule Making* in MM Docket No. 93-48, FCC 95-143 (released April 7, 1995) (*"Notice"*). Comments in this proceeding are currently due on June 16, 1995, and reply comments are due on July 17, 1995.

2. On May 30, 1995, the National Association of Broadcasters and the Association of Independent Television Stations, Inc., filed a joint request for a 90-day extension of time to file comments in this proceeding. Petitioners argue primarily that additional time is needed to conduct and thoroughly evaluate studies relevant to the issues raised by the Commission in the *Notice*.

3. As set forth in Section 1.46 of the Commission's Rules, 47 C.F.R. § 1.46, it is our policy that extensions of time for filing comments in rulemaking proceedings shall not be routinely granted. However, we recognize that it may take longer than the initial comment period established in this proceeding to collect the kinds of data sought by the Commission, and we believe that a 90-day extension of time to file comments and reply comments is warranted in order to facilitate the development of a full and complete record.

4. Accordingly, IT IS ORDERED that the Motion for Extension of Time filed in MM Docket No. 93-48 by the National Association of Broadcasters and the Association of Independent Television Stations, Inc., is GRANTED.

5. IT IS FURTHER ORDERED that the time for filing comments in this proceeding IS EXTENDED to **September 14, 1995**, and the time for filing reply comments IS EXTENDED to **October 16, 1995**.

6. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), and Sections 0.204(b), 0.283 and 1.45 of the Commission's Rules, 47 C.F.R. §§ 0.204(b), 0.283 and 1.45.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

B&P PCS, Inc.

and

R&S PCS, Inc.

Requests for Waiver of
Section 24.720(f) of the
Commission's Broadband
PCS Rules

ORDER

Adopted: July 26, 1995; Released: July 27, 1995

By the Chief, Auctions Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On July 21, 1995, B&P PCS, Inc. filed a request for a *de minimis* waiver of Section 24.720(f) of the Commission's rules. B&P is a potential applicant for the broadband PAS C Block auction, whose affiliates are BET Holdings, Inc. ("BHI") and Mile Hi Cable Partners, L.P. ("Mile Hi"). On July 25, 1995, R & S PCS, Inc., a potential applicant for the broadband PCS C Block auction with identical affiliates, filed an identical waiver request. As both entities are wholly-owned by Robert L. Johnson, they are referred to collectively as "B&P/R&S."

2. Section 24.720(f) of the Commission's Rules provides that for determining compliance with the entrepreneurs' block eligibility requirements and small business definition, gross revenues includes all income received as evidenced by audited financial statements for the relevant number of calendar years preceding January 1, 1994, or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form application.[1] In the *Sixth Report and Order*, the Commission noted that the distinction between the fiscal and calendar years was made when the broadband PCS applications for the C Block auction were to be filed in early 1995, when audited calendar year 1994 financial statements for most firms were not yet available and when it was unlikely that there would be a substantial difference between calendar and fiscal years for accounting purposes.[2] The Commission indicated that, pursuant to delegated authority, the Wireless Telecommunications Bureau could resolve the waiver requests (filed pursuant to Section 24.419) of C Block applicants that argue that the distinction presents an undue hardship on the basis of the company's particular accounting practices.[3]

3. B&P/R&S request a waiver to consider BHI's financial statements for fiscal years 1991, 1992 and 1993 in determining B&P's eligibility as a small business. B&P/R&S represent that a waiver will enable them to aggregate BHI's gross revenues, as reported on a fiscal-year basis, with the 1991, 1992, and 1993 calendar-year gross revenues of Mile Hi. In the alternative, B&P/R&S request a waiver to aggregate BHI's estimated calendar-year gross revenues for 1991, 1992 and 1993, with Mile Hi's calendar-year figures in those years to determine both B&P's and R&S's eligibility and bidding status.

II. DISCUSSION

4. Section 24.419 of the Commission's rules provides that the Commission may grant a waiver of the PCS rules based on an affirmative showing: (i) that the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or (ii) that the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Under the rule, applicants must also show the lack of a reasonable alternative. We find that B&P/R&S have shown good cause to warrant a waiver of Section 24.720(f) to consider BHI's financial statements on a fiscal-year basis. Without such a waiver, each may be disqualified from participating in the C Block auction simply because one of their affiliates, BHI, accounts for its revenues on a fiscal year that concludes on July 31 and, due to the recent changes in the Commission's rules, would have to consider the relevant years for aggregating BHI's revenues 1992, 1993 and 1994. Strict application of the rule to B&P/R&S would create an anomaly because a similarly situated company whose affiliates prepared their financial statements on a calendar-year basis would have to aggregate the revenues for 1991, 1992 and 1993. Thus, the rule may have the unintended effect of excluding B&P/R&S from the auction based simply on the choice of accounting method of their affiliate. This waiver will also serve the Commission's overall goal of affording small businesses a meaningful opportunity to participate in the competitive bidding process for spectrum-based services.[4]

III. CONCLUSION

5. Accordingly, IT IS ORDERED that, pursuant to Sections 0.331 and 24.419 of the Commission's rules, B&P PCS, Inc.'s request for waiver of Section 24.720(f) IS HEREBY GRANTED, to the extent it allows B&P to aggregate Mile Hi's calendar-year figures for 1991, 1992, and 1993 with BHI's fiscal-year figures for 1991, 1992 and 1993.

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[1] *See* 47 C.F.R. § 24.720(f).

[2] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Sixth Report and Order*, PP Docket No. 93-253, FCC 95-301, released July 18, 1995, at ¶ 57.

[3] *Id. See also* Amendment of Part O of the Commission's Rules to Reflect a Reorganization Establishing the Wireless Telecommunications Bureau and to Make Changes in the Delegated Authority of Other Bureaus, *Order*, FCC 95-213, released June 9, 1995.

[4] *See* 47 U.S.C. § 309(j)(4)(D).

6. IT IS FURTHER ORDERED that, pursuant to Sections 0.331 and 24.419 of the Commission's rules, R&S PCS, Inc.'s request for waiver of Section 24.720(f) IS HEREBY GRANTED, to the extent it allows R&S to aggregate Mile Hi's calendar-year figures for 1991, 1992, and 1993 with BHI's fiscal-year figures for 1991, 1992 and 1993.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen O' Brien Ham
Chief, Auctions Division
Wireless Telecommunications Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Annual 1995 Access Tariff Filings

Ameritech Petition Regarding Election
of 5.3 X-Factor for Application
Back to January 1, 1995

ERRATUM

Released: July 26, 1995

By the Deputy Chief, Common Carrier Bureau:

1. On July 18, 1995, the Common Carrier Bureau issued a Memorandum Opinion and Order rejecting a waiver filed by the Ameritech Operating Companies, but setting forth the conditions under which the Bureau would grant the requested relief.[1] That Order is hereby clarified in the manner described in the following paragraphs.

2. In paragraph 23, the phrase "to bring about a revenue reduction" should be corrected to read "by making an exogenous reduction" and the phrase "this additional revenue reduction" should be corrected to read "this additional reduction."

3. In paragraph 26, the phrase "incorporate a $35.071 million revenue reduction" should be corrected to read "incorporate a $35.071 million reduction"; the phrase "yield a $35.071 million rate reduction" should be corrected to read "yield a $35.071 million reduction"; the phrase "the $35.071 revenue reduction" should be corrected to read "the $35.071 million calculated sharing amounts".

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Deputy Chief, Common Carrier Bureau

[1] Annual 1995 Access Tariff Filings, Ameritech Petition Regarding Election of 5.3 X-Factor for Application Back to January 1, 1995, Memorandum Opinion and Order, DA 95-1611 (rel. July 18, 1995).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 26, 1995

Bell Atlantic Petition for Regulation as a Nondominant Provider of Interstate InterLATA Corridor Service

COMMENTS: August 25, 1995
REPLY COMMENTS: September 11, 1995

On July 7, 1995, Bell Atlantic filed a petition for waiver of Sections 61.23(c), 61.42(f), 61.42(d)(4) and 61.58 of the Commission's rules, 47 C.F.R. §§ 61.23(c), 61.42(f), 61.42(d)(4) and 61.58. Bell Atlantic seeks a waiver of these rules in order to be regulated as a nondominant provider of interstate interLATA services in the corridor areas it serves.

According to Bell Atlantic, the Modification of Final Judgment (MFJ) created the corridor service areas as a limited exception to the restrictions placed on the Bell Operating Companies to provide interLATA service. *See United States v. Western Electric Co.*, 569 F. Supp. 990 (D.D.C. 1983). Bell Atlantic states that it offers three interstate services pursuant to the exception -- service from northern New Jersey to New York; service from Philadelphia to southern New Jersey and service from southern New Jersey to Philadelphia.

Bell Atlantic contends that despite its current regulatory status as a dominant carrier, it is only a "niche provider" of interLATA services in the corridor areas it serves. It states that approximately 90 percent of the potential customers in the corridor areas do not use its corridor service. Bell Atlantic further claims that there are approximately 90 alternative providers, many of which have a national presence that provides those competitors with a competitive advantage over Bell Atlantic. Bell Atlantic also contends that the MFJ limits its long distance service to the three corridor areas, that its basic rates in these areas are approximately 20 to 30 percent lower than the basic rates of the three largest long distance carriers, and that it lacks market power for corridor services.

Bell Atlantic argues that the Commission's rules impose more restrictive regulatory conditions on its provision of corridor services than they impose on competitors that have larger market shares. Bell Atlantic notes that its tariffs must be filed on 45 days' notice, with full cost support, and are subject to price cap regulation. It claims that these requirements place it at a competitive disadvantage because its nondominant competitors may file tariffs on one day's notice, without cost support, and even AT&T, the leading provider of interexchange services in the corridor areas, may file tariffs for many of its services without cost support on 14 days' notice. According to Bell Atlantic, regulating it as a dominant provider of interstate interLATA corridor service inhibits price competition by giving competitors an opportunity to develop a competitive response during the 45 days' notice period.

Interested parties may file comments on Bell Atlantic's petition for waiver no later than **August 25, 1995**. Replies may be filed no later than **September 11, 1995**. In addition to addressing the merits of Bell Atlantic's petition, commenters are asked to address whether the issues raised by the petition are more appropriately considered in an upcoming phase of CC Docket No. 94-1, regarding the price cap performance of local exchange carriers (LECs). In such future proceedings, the Commission will address the appropriate level of regulation for LEC services which are now subject to price cap regulation, as competition for those services develops. *See Price Cap Performance Review for Local Exchange Carriers*, First Report and Order, CC Docket No. 94-1, FCC 95-132, para. 407 (adopted March 30, 1995; released April 7, 1995).

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Service (ITS), the Commission's duplicating contractor at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Richard D. Lerner, Tariff Division, Common Carrier Bureau, (202) 418-1530.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Annual 1995 Access Tariff Filings

Petitions Regarding Election
of 5.3 X-Factor for Application
Back to January 1, 1995

Rochester Telephone Corp. and
Frontier Communications of Iowa, Inc. and
Frontier Communications of Minnesota, Inc.

Lincoln Telephone and Telegraph Company

MEMORANDUM OPINION AND ORDER

Adopted: July 26, 1995; Released: July 26, 1995

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The above-referenced local exchange carriers (LECs) have filed petitions with the Commission asking for clarification or waiver of the Commission's price cap rules to permit them to adjust their price cap indices (PCIs) to reflect the effect of advancing the application of the 5.3 percent X-Factor from August 1, 1995 to January 1, 1995. They propose to make a permanent downward adjustment to their PCIs beginning in the 1995 access tariff year to reflect the revenue effect of a 5.3 percent X-Factor adjustment for the first half of 1995. In exchange for this permanent reduction in their PCIs, they ask that they not be subject to any sharing obligation with respect to their earnings during the 1995 calendar year. For the reasons discussed below, we agree with the petitioners that subjecting a local exchange carrier to a sharing regime during part of a year and a no-sharing regime during the balance may create incentives for the carriers that do not serve the public interest. We do not accept, however, the standard that they propose in their petitions for granting the relief they seek. Accordingly, although we deny the two petitions as filed, we set forth in this Memorandum Opinion and Order the conditions under which we would grant the relief they request.

II. BACKGROUND

2. Local exchange carrier (LEC) price cap indices, or PCIs, are adjusted each year based on a measure of inflation that reflects productivity gains and price changes in the national economy, minus an X-Factor.[1] The X-Factor is a number that reflects the amount by which the growth in telephone carriers' unit costs have historically been lower than the level of inflation for the national economy. The X-Factor is used in the price cap formula to ensure that rates for LEC regulated services continue to decline in relation to the economy as a whole. It is also intended to generate incentives for LECs to achieve higher productivity levels.[2]

3. In the *LEC Price Cap Review Order*, the Commission amended its rules to establish a minimum X-Factor of 4.0 percent, with two optional X-Factors of 4.7 and 5.3 percent.[3] LECs selecting the 4.0 and 4.7 percent X-Factors are subject to sharing requirements.[4] The sharing mechanism requires a LEC to return to customers its earnings in excess of certain levels, including interest, through a temporary reduction in the LEC's PCIs in the next annual access period. The amount of the revenue reduction is determined by a temporary adjustment to the LEC's PCI, which is calculated in the same manner as other exogenous changes to the price cap formula.[5] When applied to the revised X-Factors, the sharing mechanism effectively permits a LEC selecting the 4.0 percent X-Factor to reach a maximum 12.75 percent rate of return. Likewise, a LEC selecting and outperforming an X-Factor of 4.7 percent can realize at most a 14.25 percent rate of return.[6]

4. The Commission determined that LECs selecting the 5.3 percent X-Factor under the interim plan should not be subject to a sharing requirement.[7] It reasoned that, although the 5.3 percent X-Factor represents a "major challenge" to most LECs, the most efficient ones will opt to use the higher factor if they are permitted to retain all the profits earned, rather than be subject to a sharing require-

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[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6786, 6796 (1990) (*LEC Price Cap Order), on recon.*, 6 FCC Rcd 2637 (1991), *aff'd sub nom.*, National Rural Telecom Ass'n v. FCC, 988 F.2d 174 (D.C. Cir. 1993); In the Matter of Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, First Report and Order, FCC 95-132 (rel. April 7, 1995)(*LEC Price Cap Review Order)* at para. 99.

[2] *LEC Price Cap Review Order* at para. 99.

[3] *Id.* at paras. 210-217.

[4] *Id.* at paras. 221-222. LECs choosing an X-Factor of 4.7 percent are required to share with their customers half of their earnings from 12.25 percent to 16.25 percent, and all of their earnings above 16.25 percent. Likewise, LECs selecting the 4.0 percent X-Factor must share with their customers half of their earnings from 12.25 to 13.25 percent, and all of their earnings above 13.25 percent. The customers' share is returned with interest through a one-time reduction in the PCI for the next annual access period, calculated in the same manner as other exogenous changes in the formula.

[5] *See* Section 61.45(d)(2) of the Commission's Rules, 47 C.F.R. § 61.45(d)(2). *See also LEC Price Cap Order*, 5 FCC Rcd at 6788, 6801. In calculating earnings, the effect of the previous year's sharing adjustment is eliminated through an "add-back adjustment," which requires the LEC to add an amount equal to the sharing adjustment amount to its current year revenues prior to calculating its rate of return for the current year. *See* Section 61.3(e) of the Commission's Rules, 47 C.F.R. § 61.3(e) (base period earnings shall not include amounts associated with exogenous adjustments to the PCI for the sharing adjustment mechanism). *See also* Price Cap Regulation of Local Exchange Carriers, Rate-of-Return Sharing and Lower Formula Adjustment, CC Docket No. 93-179, FCC 95-133 (rel. April 14, 1995).

[6] *LEC Price Cap Review Order* at para. 200.

[7] *Id.* at paras. 215 - 220.

ment. The Commission determined that this revision to its price cap plan will encourage continued movement away from rate-of-return regulation.[8]

5. A LEC that selects the 5.3 percent X-Factor beginning with its 1995 annual access filing will not be subject to sharing obligations based on its earnings during the 1995 annual access tariff year. Such a LEC, however, remains subject to the sharing requirements in its 1996 annual access filing because a LEC's sharing obligations for the 1996 access year are based on its 1995 calendar year earnings. Since all LECs were subject to sharing requirements during the first six months of 1995, based on the X-Factor they selected in their 1994 annual access tariff filings, their performance during that part of 1995 may cause them to incur sharing obligations for the 1996 annual access tariff year.

6. LECs subject to price cap regulation were required to implement the new X-Factor and sharing rules in their 1995 annual access tariff filings.[9] The Common Carrier Bureau (Bureau) rescheduled the effective date for the price cap LECs' 1995 annual access filings from July 1, 1995 to August 1, 1995, to allow them to do so. The Bureau also required LECs to make a one-time adjustment to their proposed PCIs to account for the one month delay in the effective date of the 1995 annual access filings.[10]

7. On June 14, 1995, Rochester Telephone Corp. (Rochester) and Frontier Communications of Iowa, Inc. and Frontier Communications of Minnesota, Inc. (collectively, Frontier) filed a joint petition with the Commission.[11] In their petition, the parties ask the Commission to clarify that the modified LEC price cap rules permit them to elect to apply a 5.3 percent productivity offset figure (or X-Factor) as of January 1, 1995. In the alternative, they request a waiver of the Commission's rules or Orders to make the election. AT&T Corporation (AT&T), MCI Telecommunications Corporation (MCI), and Time-Warner Communications Holdings, Inc. (TW Comm) filed comments opposing the Rochester and Frontier waiver, arguing that the effect of granting the waiver is not in the public interest.[12] Rochester and Frontier filed a reply.

8. On June 29, 1995, the Lincoln Telephone and Telegraph Company (Lincoln) filed a petition requesting substantially the same relief as that requested by Rochester and Frontier.[13] AT&T and MCI filed comments opposing the Lincoln petition for the same reasons that they oppose the waiver filed by Rochester and Frontier.[14] Lincoln filed a reply.

9. The waiver requests filed by Rochester, Frontier and Lincoln are similar to a request filed by the Ameritech Operating Companies (Ameritech) on May 9, 1995. On July 18, 1995, the Bureau issued an order that rejected Ameritech's proposal as filed, but set forth the conditions under which the Bureau would grant the requested relief.[15] Specifically, we stated that we would relieve Ameritech of its potential sharing obligation based on its actual earnings during the first six months of calendar year 1995, if Ameritech adjusted its PCIs downward to implement an exogenous reduction that is at least equal to the value of the sharing obligation, including interest, that Ameritech is likely to incur for the first six months of 1995. Our stated goal was to ensure that grant of the requested relief would have a "revenue-neutral" impact on Ameritech's ratepayers.[16]

III. DISCUSSION

A. Waiver Standard

10. The Commission may exercise its discretion to waive a rule where there is "good cause" to do so.[17] A waiver of the rules is appropriate if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.[18] As the Commission recently stated, special circumstances that are unique in degree may justify grant of a waiver if the waiver will serve the public interest.[19] The Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.[20] Further, grant of a waiver must be based on articulated, reasonable standards that are predictable, workable, and not susceptible to discriminatory application.[21] Therefore, the general test for whether Rochester, Frontier and Lincoln may be granted a waiver is whether they have shown special circumstances that warrant deviation from the Commission's rules and that deviation from the rules will serve the public interest.

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[8] *Id.*

[9] *See* 1995 Annual Access Tariffs, United States Telephone Association Application for Waiver, DA 95-494 (rel. Mar. 16, 1995).

[10] Cost Support Material to be Filed with 1995 Annual Access Tariffs, Revisions to Tariff Review Plan for Price Cap Companies, DA 95-823 (rel. April 14, 1995)(*TRP Revisions Order)* at paras. 20-21.

[11] The Bureau released a Public Notice establishing a pleading cycle for comments and replies concerning the waiver request of Rochester and Frontier. *See* Rochester and Frontier File Joint Petition for Clarification or Waiver of Price Cap Rules, Public Notice, DA 95-1393, (rel. June 20, 1995).

[12] AT&T Comments at 4; MCI Comments at 3-4; TW Comm Comments at 2-3.

[13] The Bureau released a Public Notice establishing a pleading cycle for comments and replies concerning Lincoln's waiver request. *See* Lincoln Telephone and Telegraph Company Files Petition for Clarification or Waiver of Price Cap Rules, Public Notice, DA 95-1490, (rel. June 30, 1995). In its petition, Lincoln incorporated its June 16, 1995 comments, which were filed in support of a similar petition that Pacific Bell and Nevada Bell filed with the Commission on June 5, 1995.

[14] AT&T Comments at 4; MCI Comments at 1-2. In its petition, MCI incorporated its June 21, 1995 opposition to Lincoln's June 16, 1995 comments.

[15] Annual 1995 Access Tariff Filings, Ameritech Petition Regarding Election of 5.3 X-Factor for Application Back to January 1, 1995, Memorandum Opinion and Order, DA 95-1611 (rel. July 18, 1995)(*Ameritech Order).*

[16] *Id.* at para. 22.

[17] *See* Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3.

[18] Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990)(*Northeast Cellular); See also* WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied,* 409 U.S. 1027 (1972)(*WAIT Radio).*

[19] NYNEX Telephone Companies Petition for Waiver, Transition Plan to Preserve Universal Service in a Competitive Environment, Memorandum Opinion and Order, FCC 95-185 (rel. May 4, 1995), at paras. 31-32.

[20] *WAIT Radio,* 418 F.2d at 1158.

[21] *Northeast Cellular,* 897 F.2d at 1166.

1. Special Circumstances

11. We find that Rochester, Frontier and Lincoln have shown that special circumstances exist that are sufficient to warrant granting their waivers, subject to the conditions set forth in this Order. Under the Commission's original price cap plan, price cap LECs were subject to a possible sharing obligation, regardless of which X-Factor they used in their annual access filings. For the 1995 access tariff year, however, price cap LECs need not be subject to a possible sharing obligation if they select the 5.3 percent "no-sharing" X-Factor, which is contained in the Commission's recently adopted interim price cap plan. The transition from the initial price cap scheme, under which no "no-sharing" option was available, to the interim price cap plan presents uniquely difficult circumstances for those among the price cap LECs that opt to use the 5.3 percent X-Factor to calculate their PCIs during the 1995 tariff year. Although their use of the 5.3 percent X-Factor relieves Rochester, Frontier and Lincoln of any sharing obligations during the second half of the 1995 calendar year, they remain subject to sharing obligations in the first half of the 1995 calendar year when they did not use the 5.3 percent X-Factor.[22] Because a LEC's earnings are reported on a calendar year basis, its first-half-year sharing obligation will be calculated by averaging its earnings in the second half of 1995 with its earnings in the first half of 1995. Therefore, the earnings of these LECs in the second half of 1995, if they are high, could increase their respective sharing amounts. As a result, their potential sharing obligations in the first half of 1995 will dampen their incentives to become more productive during the remainder of the year. We conclude that these special circumstances may warrant deviation from the rules, in the context of the election that Rochester, Frontier and Lincoln wish to make to have the 5.3 percent X-Factor cover the first half of 1995.

2. The Public Interest

12. We find that waiving the potential future sharing obligations of Rochester, Frontier and Lincoln, based on their actual performance during the first six months of 1995, will serve the public interest, provided ratepayers are not adversely affected. As we stated in the *Ameritech Order*, the relief these LECs seek will expedite the Commission's goal of implementing "pure" price cap regulation.[23] Further, grant of the requested relief serves the price cap policy goal of more closely reflecting the incentives of a competitive market. Moreover, grant of this relief would bring about additional reductions in their PCIs for the 1995 access tariff year. Accordingly, we conclude that grant of the requested relief would serve the public interest, provided ratepayers are not adversely affected.

13. Rochester, Frontier and Lincoln do not propose to implement rate reductions in their 1995 annual access tariff filings in the manner we specified in the Ameritech Order.[24] Rather, they contend that the permanent reductions they propose will exceed the amount of their 1995 potential sharing obligations over several annual access tariff periods.[25] Lincoln, for example, claims that its proposed one percent permanent reduction equates to $323,803 per year in terms of 1994 base period revenues. It argues that the amount of the cumulative reduction will exceed its estimated 1995 sharing obligation in less than three years.[26]

14. We decline to grant the petitioners' requests as proposed. We do not believe that implementation of their proposal will adequately protect ratepayers' interests. MCI suggests that we could require the LECs to keep their proposed permanent reductions in place for a certain period of time.[27] However, as Rochester and Frontier observe, the nature of the access business is unpredictable, and a LEC's potential sharing obligations could be affected by changes in general economic conditions, as well as the particular competitive environment affecting each individual LEC.[28] Because of this uncertainty, access ratepayers have no assurance that they will receive the same benefits if the waivers are granted that they will under the Commission's sharing requirement if the waivers are denied. We therefore find that requiring these LECs to implement a permanent revenue reduction is not in the public interest.

15. We, accordingly, conclude that we should adopt the same approach to evaluating the proposals of Rochester, Frontier, and Lincoln that we adopted in the *Ameritech Order*.[29] Under this standard, we will waive the 1995 sharing requirements of these LECs if grant of their waivers has the same effects on their price cap levels in 1995 as the operation of the sharing mechanism would, if sharing obligations were based on earnings in the first half year of 1995.[30]

B. The Companies' Sharing Obligations

1. The Rochester and Frontier Companies

16. We find that the 1995 sharing requirements of Rochester and Frontier may be waived if ratepayers and the public receive benefits that are equal to the benefits that they likely would otherwise receive if the Rochester and Frontier waiver were denied, and if sharing obligations were based on earnings in the first half of the 1995 calendar year only. The Bureau has calculated that the value of Rochester and Frontier's combined sharing obligation, including interest, that would be attributable to their performance in the first half of 1995, and thus would be subject to sharing in their 1996 annual access tariffs, is approximately $4.083 million. This total was computed by estimating separately the sharing obligations of Rochester's Tier 1 company, its Tier 2 companies, and Frontier in order to reflect more closely the behavior of these entities in our estimates. Specifically, we estimate that Rochester's

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[22] In their 1994 annual access tariff filings, both Rochester and Frontier used X-Factors of 4.3 percent; Lincoln used an X-Factor of 3.3 percent.

[23] *Ameritech Order* at para. 20.

[24] AT&T Comments on Rochester and Frontier Petition at 4; MCI Comments on Rochester and Frontier Petition at 3; AT&T Comments on Lincoln Petition at 4; MCI Comments on Lincoln Petition at 1-2.

[25] Rochester and Frontier Reply at 2; Lincoln Petition at 2; Lincoln Reply at 2-3.

[26] Lincoln Petition at 2; Lincoln Reply at 2-3.

[27] MCI Comments at 2 (asking the Commission to stipulate that Lincoln keep the one percent reduction in its PCIs for at least three years if Lincoln's waiver is granted).

[28] Rochester and Frontier Reply at 3.

[29] *Ameritech Order* at paras. 21-22.

[30] *Id.* at para. 22.

Tier 1 company[31] likely will not incur a sharing obligation during the first six months of 1995. Rochester's Tier 2 companies' estimated sharing obligation is $2.608 million, and Frontier's (Minnesota and Iowa) estimated sharing obligation is $1.475 million. These estimates were computed using the methods discussed below.

17. *The Rochester Tier 1 Company.* The Bureau estimated that Rochester's Tier 1 company would not incur a sharing obligation for the first half of the 1995 calendar year using the following method. First, we estimated the Tier 1 company's annual interstate rate of return for the 1995 calendar year to be 11.93 percent using a trend line regression based on its 1991-1994 reported rates of return, which were adjusted for add-back amounts. The Rochester Tier 1 and Tier 2 companies reported composite rates of return in 1991 and 1992 as the Rochester Telephone Corporation. Thus, there were no separately reported figures for the Rochester Tier 1 and Tier 2 companies for the years 1991 and 1992. Rochester did not furnish actual disaggregated earnings data for its Tier 1 and Tier 2 operating companies for 1991 and 1992. Instead, Rochester provided only estimates of its Tier 2 subsidiaries' rates of return for these two years. Since no actual data were provided, we assumed instead that the Rochester Tier 1 company's rates of return for 1991 and 1992 were the same as the consolidated rates of return reported by Rochester Telephone Corporation. The trend line regression is based on these 1991-1994 data, which were adjusted for addback amounts.

18. Next, we determined the potential sharing requirement of Rochester's Tier 1 company. Because these companies used an X-Factor of 4.3 percent in their 1994 annual access tariff filing, a potential sharing requirement will be incurred if earnings exceed a 13.25 percent rate of return.[32] Because its rate of return for 1995 was estimated at less than 13.25 percent, we determined the Rochester Tier 1 company's net sharing obligation for the 1995 calendar year to be zero.

19. *The Rochester Tier 2 Companies.* The Bureau estimated the Rochester Telephone Tier 2 companies' sharing obligation to be $2.608 million in the following manner. First, we estimated its annual interstate rate of return for the 1995 calendar year to be 19.99 percent using a trend line regression. For the reasons stated previously, we assumed that these companies' rates of return for 1991 and 1992 were the same as the rates of return reported by Rochester Telephone Corporation. Thus, the trend line regression is based on 1991 and 1992 composite data and 1993 and 1994 actual data for the Rochester Tier 2 companies. All data points were adjusted for addback amounts.

20. We then determined the potential sharing requirement of the Rochester Tier 2 companies. Because these companies used an X-Factor of 4.3 percent in their 1994 annual access tariff filing, their potential sharing requirement equals half of all earnings between a 13.25 and 17.25 percent rate of return, and 100 percent of all earnings that exceed a 17.25 percent rate of return.[33] Accordingly, we calculated Rochester's Tier 2 net sharing obligation for the 1995 calendar year in the following manner. First, we estimated the companies' "50/50" sharing amount by multiplying their average net investment for 1994 by two percent (*i.e.*, one-half the difference between 17.25 percent and 13.25 percent). Next, we estimated their sharing amount over the 17.25 percent threshold by multiplying the companies' average net investment for 1994 by 2.74 percent (*i.e.*, the difference between 19.99 percent and 17.25 percent). We then divided the sum of these two estimates by two to limit our estimate of their sharing obligation to the first half of 1995. We then increased this amount to reflect the Rochester Tier 2 companies' composite tax rate of 40.20 percent.[34] Finally, we added an interest component to the estimated sharing obligation to recognize that, although these companies would incur the projected sharing obligation between January and July, 1995, they are required to discharge the obligation in their 1996 annual access filing.[35]

21. *The Frontier Companies.* The Bureau estimated Frontier's $1.475 million sharing obligation using the following method. First, we estimated Frontier's annual interstate rate of return for the 1995 calendar year to be 20.29 percent using a trend line regression based on Frontier's 1991-1994 reported rates of return, which were adjusted for add-back amounts. Next, we determined their potential sharing requirement. Because these companies used an X-Factor of 4.3 percent in their 1994 annual access tariff filing, their potential sharing requirement equals half of all earnings between a 13.25 and 17.25 percent rate of return, and 100 percent of all earnings that exceed a 17.25 percent rate of return.[36] Accordingly, we calculated Frontier's net sharing obligation for the 1995 calendar year in the following manner. First, we estimated the companies' "50/50" sharing amount by multiplying their average net investment for 1994 by two percent (*i.e.*, one-half the difference between 17.25 percent and 13.25 percent). Next, we estimated their sharing amount over the 17.25 percent threshold by multiplying the companies' average net investment for 1994 by 3.04 percent (*i.e.*, the difference between 20.29 percent and 17.25 percent). We then divided the sum of these two estimates by two to limit our estimate of their sharing obligation to the first half of 1995. We then increased this amount to reflect Frontier's composite tax rate of 40.85 percent.[37] Finally, we added an interest component to the estimated sharing obligation to recognize that, although these companies would incur the projected sharing obligation between January and July, 1995, they are required to discharge the obligation in their 1996 annual access filing.[38]

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[31] Tier 1 LECs are companies having annual revenues from regulated telecommunications operations of $100 million or more for a sustained period of time. *See* Commission Requirements for Cost Support Material To Be Filed With 1990 Annual Access Tariffs, Order, 5 FCC Rcd 1364 (Com. Car. Bur. 1990).

[32] *See* Section 61.45(d)(2) of the Commission's Rules, 47 C.F.R. § 61.45(d)(2).

[33] *Id.*

[34] Rochester's Tier 2 composite tax rate was computed from its 1995 Annual Access Charge Tariff Filing, FCC Form 492A.

[35] Rochester's Tier 2 companies would actually hold these funds for 18 months, i.e., to July 1996 when it would have to adjust its PCI for sharing. The Commission's rules require interest to be added to the sharing obligation for the 12 month tariff year. However, in recognition that the sharing obligation would be met up front, the additional 12 months interest is excluded from the computation. The interest formula that we used to compute the six month interest is: $P/2(1 + 0.1125)6/12 - P/2$, where P is the estimated sharing obligation.

[36] *See* Section 61.45(d)(2) of the Commission's Rules, 47 C.F.R. § 61.45(d)(2).

[37] Frontier's composite tax rate was computed from its 1995 Annual Access Charge Tariff Filing, Exhibit 2-5.

[38] Frontier would actually hold these funds for 18 months, i.e.,

2. The Lincoln Telephone and Telegraph Company

22. We find that Lincoln's 1995 sharing requirements may be waived if ratepayers and the public receive benefits that are equal to the benefits that they likely would otherwise receive if Lincoln's waiver were denied, and if sharing obligations were based on earnings in the first half of the 1995 calendar year only. The Bureau has calculated that the value of Lincoln's likely sharing obligation, including interest, that would be attributable to its performance in the first half of 1995, and thus would be subject to sharing in its 1996 annual access tariffs, is approximately $797,918.

23. The Bureau estimated the $797,918 sharing obligation for Lincoln for the first half of 1995 using the following method. First, we estimated Lincoln's annual interstate rate of return for the 1995 calendar year to be 15.93 percent by assuming Lincoln's rate of return for 1995 would be the same as it was in 1994, adjusted for add-back amounts as required in the Commission's Rules.[39] Because Lincoln used an X-Factor of 3.3 percent in its 1994 annual access tariff filing, a potential sharing requirement is triggered if its earnings exceed 12.25 percent. Pursuant to the Commission's rules, Lincoln would be required to share 50 percent of its earnings over a 12.25 percent rate of return.[40] Accordingly, we calculated Lincoln's net sharing obligation for the 1995 calendar year by multiplying Lincoln's 1994 average net investment by one-half the difference between the estimated rate of return of 15.93 percent and 12.25 percent. We then divided this amount by two to limit our estimate of Lincoln's sharing obligation to the first half of 1995. We then increased this total sharing obligation to reflect Lincoln's composite tax rate of 40.08 percent.[41] Finally, we added an interest component to the estimated sharing obligation to recognize the fact that, although Lincoln would incur the projected sharing obligation between January and July, 1995, it is required to discharge the obligation in its 1996 annual access filing.[42]

24. The method we used to estimate Lincoln's sharing obligation for the first half of the 1995 calendar year is a conservative and reasonable approach. Our assumption that Lincoln's rate of return will be the same in 1995 as it was in 1994 is a conservative assumption, since Lincoln's earnings have risen each year under price cap regulation. Our preference was to base our estimate on this conservative assumption. Lincoln elected price cap regulation in 1993. Including data from previous annual access periods while Lincoln was operating under rate of return rules would not have provided an accurate measure of Lincoln's performance under price cap regulation. Earnings data for the first quarter of 1995 are already on file with the Commission. However, we did not rely on the data reported by Lincoln concerning the first quarter of 1995 to determine earnings for the first half of 1995. Because a LEC's reported earnings results for the first quarter of a year are often subject to substantial downward revisions throughout the year, use of first quarter earnings could lead to an overestimate of Lincoln's sharing obligation for the first half of the 1995 calendar year. We believe that our use of historical earnings produces a more reliable estimate.

25. We recognize that AT&T's estimate of Lincoln's sharing obligation, adjusted for six months, is slightly higher than the estimate produced by our methodology. We believe, however, that our methodology is superior to that used by AT&T. Moreover, the difference in the results produced by each model is, in any event, quite modest.[43]

C. Implementation Issues

26. If Rochester's Tier 2 companies wish to obtain a waiver of the requirement in the Commission's rules that it share earnings during the first six months of 1995 that exceed 13.25 percent, it must incorporate a $2.608 million reduction to its PCIs using the methodology described in this paragraph. First, it must multiply the $2.608 million calculated sharing amount by 1.0909, or 12/11, to yield $2.845 million. This amount must be treated as a Delta Z exogenous adjustment. This Delta Z must then be incorporated into the Rochester Tier 2 companies' PCIs using the same method as that applied to sharing.[44] Likewise, if Frontier wishes to obtain a waiver of the requirement in the Commission's rules that it share earnings during the first six months of 1995 that exceed 13.25 percent, it must incorporate a $1.475 million reduction to its PCIs by first multiplying the $1.475 million calculated sharing amount by 1.0909, or 12/11, to yield $1.609 million. This amount must be treated as a Delta Z exogenous adjustment, which must be incorporated into Frontier's PCIs using the same method as that applied to sharing.[45] Finally, if Lincoln wishes to obtain a waiver of the requirement in the Commission's rules that it share earnings during the first six months of 1995 that exceed 12.25 percent, it must incorporate a $797,918 reduction to its PCIs by first multiplying the $797,918 calculated sharing amount by 1.0909, or 12/11, to yield $ 870,449. This amount must be treated as a

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to July 1996 when it would have to adjust its PCI for sharing. The Commission's rules require interest to be added to the sharing obligation for the 12 month tariff year. However, in recognition that the sharing obligation would be met up front, the additional 12 months interest is excluded from the computation. The interest formula that we used to compute the six month interest is: P/2(1 + 0.1125)6/12 - P/2, where P is the estimated sharing obligation.

[39] *See* Section 61.3(e) of the Commission's Rules, 47 C.F.R. § 61.3(e).

[40] *See* Section 61.45(d)(2) of the Commission's Rules, 47 C.F.R. § 61.45(d)(2).

[41] Lincoln's composite tax rate was computed from its 1995 Annual Access Charge Tariff Filing, Chart EXG-SHR.

[42] Lincoln would actually hold these funds for 18 months, i.e., to July 1996 when it would have to adjust its PCI for sharing. The Commission's rules require interest to be added to the sharing obligation for the 12 month tariff year. However, in recognition that the sharing obligation would be met up front, the additional 12 months interest is excluded from the computation. The interest formula that we used to compute the six month interest is: P/2(1 + 0.1125)6/12 - P/2, where P is the estimated sharing obligation.

[43] The difference between AT&T's estimate of sharing and the Bureau's estimate is primarily caused by the length of time over which interest is computed.

[44] The Rochester Tier 2 companies should list this exogenous cost change as a separate item from the other sharing obligations on Form EXG-1 of their TRP.

[45] Frontier should list this exogenous cost change as a separate item from the other sharing obligations on Form EXG-1 of its TRP.

Delta Z exogenous adjustment, which must be incorporated into Lincoln's PCIs using the same method as that applied to sharing.[46]

27. Moreover, because grant of this waiver, consistent with our revenue neutrality standard, must have the same estimated effect on their price cap levels as the sharing mechanism would, we further direct Rochester's Tier 2 companies, Frontier and Lincoln to allocate the reduction among all price cap baskets in the same manner that would occur if they remained subject to the sharing mechanism. They are also required to reverse this reduction in their 1996 annual access filings using the methodology for reversing sharing that is described in the *1995 TRP*.[47]

28. To compute their earnings for 1996, Rochester's Tier 2 companies, Frontier and Lincoln should treat the estimated exogenous amounts as though they were sharing amounts. Thus, when calculating their 1996 rates of return, they should "add back" the portion of the exogenous change that they will flow through to their customers in their 1996 annual access rates. If one of these LECs does not use a "no-sharing" X-Factor in its 1996 annual access tariff filing, it could incur a sharing obligation with respect to its 1996 earnings. This adjustment will prevent an understatement of the company's 1996 earnings that would otherwise be caused by its "sharing" a portion of the $40.3 million in 1996.

V. ORDERING CLAUSES

29. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), and Sections 0.91, 0.291 and 1.3 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291 and 1.3, the petitions for waiver filed by Rochester Telephone Corp. and Frontier Communications of Iowa, Inc. and Frontier Communications of Minnesota, Inc., and the Lincoln Telephone and Telegraph Company ARE GRANTED subject to the conditions described in this Order and are otherwise denied.

30. IT IS FURTHER ORDERED that Rochester Telephone Corp. and Frontier Communications of Iowa, Inc. and Frontier Communications of Minnesota, Inc., and the Lincoln Telephone and Telegraph Company MAY FILE revisions to their 1995 annual access tariffs to become effective August 1, 1995, on not less than one day's notice, in order to waive their 1995 sharing obligations provided they comply with the requirements in this Order and with the requirements in the Commission's price cap rules.

31. For purposes of compliance with this Order, we waive the notice requirements of Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58 and 61.59. Rochester Telephone Corp. and Frontier Communications of Iowa, Inc. and Frontier Communications of Minnesota, Inc., and the Lincoln Telephone and Telegraph Company should cite the "DA" number of this Order as the authority for this filing.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Deputy Chief, Common Carrier Bureau

[46] Lincoln should list this exogenous cost change as a separate item from the other sharing obligations on Form EXG-1 of its TRP.

[47] Cost Support Material to be Filed with 1995 Annual Access Tariffs, Tariff Review Plans, DA 95-264 (rel. Feb. 17, 1995)(*1995 TRP)*, para. 21 n.23.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-10

In re Applications of

The Lutheran Church/ Missouri Synod — File Nos. BR - 890929VC, BR - 890929VB

For Renewal of Licenses
of Stations KFUO/KFUO-FM
Clayton, Missouri

Appearances

Richard R. Zaragoza, Esquire, Kathryn R. Schmeltzer, Esquire, Barry H. Gottfried, Esquire, Scott R. Fleck, Esquire, Lauren Ann Lynch, Esquire, and *Sharon L. Tasman, Esquire,* on behalf of The Lutheran Church-Missouri Synod; *David E. Honig, Esquire,* and *David McCurdy, Esquire,* on behalf of the Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP, and the St. Louis County Branch of the NAACP; *Robert A. Zauner, Esquire,* and *Y. Paulette Laden, Esquire,* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission; and *Philip W. Horton, Esquire,* on behalf of witness Marcia A. Cranberg, Esquire.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE ARTHUR I. STEINBERG

Issued: August 30, 1995; Released: September 15, 1995

PRELIMINARY STATEMENT

1. By *Hearing Designation Order and Notice of Opportunity for Hearing,* 9 FCC Rcd 914 (1994) (*"HDO"*), the Commission designated for hearing the applications of The Lutheran Church-Missouri Synod ("Church" or "LCMS") for renewal of the licenses of Stations KFUO(AM) and KFUO-FM (collectively "Stations" or "KFUO"). The hearing issues specified in the *HDO,* as subsequently modified by *Memorandum Opinion and Order,* FCC 94M-191, released March 25, 1994, are as follows:

> (1) To determine the extent to which the licensee of Stations KFUO/KFUO-FM complied with the nondiscrimination and affirmative action provisions specified in Sections 73.2080(a) and 73.2080(b) of the Commission's Rules, 47 C.F.R. § 73.2080;
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> (2) To determine whether the licensee of Stations KFUO/KFUO-FM made misrepresentations of fact or was lacking in candor in violation of Section 73.1015 of the Commission's Rules, 47 C.F.R. § 73.1015, with regard to the stations' EEO program and documents submitted in support thereof; and
>
> (3) To determine whether, in light of evidence adduced pursuant to the foregoing issues, a grant of the subject license renewal applications would serve the public interest, convenience and necessity.

2. In accordance with Section 309(e) of the Communications Act of 1934, as amended ("Act"), the Commission assigned both the burden of proceeding with the introduction of the evidence and the burden of proof with respect to all of the issues to the Church. (*HDO* at para. 33.)

3. The *HDO* further stated that, irrespective of whether the hearing record warrants an order denying the renewal applications of the Church, it shall be determined pursuant to Section 503(b) of the Act whether an order of forfeiture in an amount not to exceed $250,000 shall be issued against the Church for the willful and/or repeated violations of 47 C.F.R. § 73.2080 (establishing and maintaining an affirmative action policy), and 47 C.F.R. § 73.1015 (submitting truthful statements and responses to the Commission). (*HDO* at para. 37.)

4. A prehearing conference in this proceeding was held on March 16, 1994. Hearings were held in Washington, D.C., on June 20, 21, 22, 23, and 24, 1994. The record was initially closed at the conclusion of the June 24, 1994, hearing session. (Tr. 1117; *Order,* FCC 94M-423, released June 29, 1994.) The record was reopened on two occasions for the receipt of additional exhibits, and was reclosed for the final time on September 29, 1994. (*Order,* FCC 94M-443, released July 14, 1994; *Order,* FCC 94M-551, released September 29, 1994.)

5. Proposed findings of fact and conclusions of law were filed by the Mass Media Bureau ("Bureau") on September 2, 1994, and by the Church and the Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP, and the St. Louis County Branch of the NAACP (collectively "NAACP"), on September 6, 1994. Reply findings were filed by the Church and the Bureau on October 31, 1994, and by the NAACP on November 1, 1994.

FINDINGS OF FACT

I. Background

A. The Church's Mission for the Stations

6. The Church is the licensee of KFUO(AM) and KFUO-FM, licensed to Clayton, Missouri. KFUO(AM) went on the air in 1924 and is a 5,000 watt daytime-only AM station, operating noncommercially on 850 kHz and broadcasting religious programming. KFUO-FM went on the air in 1948 and is a full-time commercial FM station operating on 99.1 MHz and broadcasting classical music with a religious orientation and some religious programming. (Church Ex. 1, pp. 1, 3, 7; Church Ex. 4, p. 3; Church Ex. 7, p. 2.)

7. The Church, either directly or through Concordia Seminary ("Seminary"), has been the owner and operator of KFUO(AM) since 1924. According to the Church, KFUO(AM) has the "distinction" of being the "world's oldest religious broadcast facility"; it was the first daily station to come on the air with and continuously maintain a religious format. (Church Ex. 7, p. 4.) In 1948, the Church put KFUO-FM on the air. KFUO-FM is the only

full-time classical music format station in the St. Louis radio market. (Church Ex. 1, p. 1.) The studios of both KFUO(AM) and KFUO-FM are located in the same building on the campus of the Church's Concordia Seminary in Clayton, Missouri. (Church Ex. 4, p. 3.)

8. In the Church's view, both of the Stations "have been dedicated to the task of carrying out in their way the Great Commission which Christ gave to His Church, to preach the Gospel to every creature and to nurture and serve people in a variety of ways." (Church Ex. 7, pp. 1-2; Church Ex. 4, pp. 2-3.) During the period from February 1, 1983, to and including February 1, 1990 ("License Term") (Tr. 13-14), KFUO(AM)'s format was religious and KFUO-FM broadcast sacred as well as nonliturgical classical music. For example, KFUO-FM played Bach, Schuetz, Handel, Mendelssohn and others, and related them to the Church year. (Church Ex. 7, pp. 3, 5-6; Church Ex. 4, p. 3 and Att. 1.) Both of the Stations also served the mission of the Church's ministry by giving professional help and training to the students of Concordia Seminary. (Church Ex. 7, pp. 5-6.)

B. History of the Church's Involvement in Broadcasting

9. On February 19, 1923, the Chairman of the Board of Control of Concordia Seminary proposed the idea of operating a radio station either at the Seminary or at Concordia Publishing House. The funds for construction and the initial operating expenses of KFUO(AM) came from the Seminary and the Lutheran Layman's League ("League"), as well as from the St. Louis Lutheran Publicity Organization and the Walther League. The students of the Seminary, in addition to raising $1,500 in donations from friends and relatives, also appropriated $1,000 from the student treasury to help build the radio station. (Church Ex. 1, pp. 2-3.)

10. Station KFUO(AM) went on the air on December 14, 1924. It was officially dedicated to the "glory of God" during an evening broadcast on that day from an attic studio at the Seminary, located at that time in St. Louis. The station's commitment was to promote Gospel outreach and service to the listening audience through religious programming and "serious" music. (Church Ex. 1, p. 3.) The founders of the station were proponents of a ministry to the "whole man" and believed classical music was important to that ministry. Martin Luther had said: "After theology, I accord to music the highest place and greatest honor." Throughout its early years, the Church believed that KFUO(AM) was following Luther's tradition by using fine classical music, much of which was composed for use in church liturgy, to glorify the name of Jesus Christ. (Church Ex. 7, p. 2.)

11. KFUO(AM)'s first license was issued to Concordia Seminary by then Secretary of Commerce Herbert Hoover on January 29, 1925, for a term expiring January 25, 1926. The station began broadcasting with a 500-watt transmitter at 550 kHz, sharing that dial position with Station KSD(AM), St. Louis, Missouri. (Church Ex. 1, p. 3 and Att. 1.)

12. In 1924, when KFUO became operational, there were fewer than 600 radio stations in the United States and the station's broadcast signal extended from the east coast to the Rocky Mountains at certain times during the broadcast day. With the rise in the number of broadcast stations and increased industry regulation through the Federal Radio Commission, the broadcast range of KFUO(AM) gradually diminished. Initially the station broadcast only two programs per week, on Sunday and Wednesday evenings. By 1928, KFUO(AM) was broadcasting 34 programs per week, approximately 21 hours of programming. (Church Ex. 1, pp. 3-4.)

13. In 1926, Concordia Seminary relocated from St. Louis to a new campus in suburban Clayton, Missouri, requiring relocation of KFUO(AM). The problem of moving the radio facility was resolved when the League offered to rebuild the station at the new Seminary and to provide funds for annual maintenance. In conjunction with the relocation, on June 15, 1926, the League submitted a resolution to the Missouri Synod ("Synod"), *i.e.*, the Church body in Convention, proposing that the Synod take over the station with control in the hands of the Board of Control of Concordia Seminary. KFUO(AM)'s new facility at the Seminary's Clayton campus was dedicated on May 29, 1927. At that time, KFUO began operating with a 1,000 watt transmitter. (Church Ex. 1, p. 4; Tr. 720, 850.)

14. In November 1940, the Commission approved the Church's application to operate on 830 kHz and for an increase in power to 5,000 watts. A few months later, the FCC modified KFUO(AM)'s frequency to 850 kHz, the position it currently occupies on the dial. (Church Ex. 1, p. 7.)

15. In 1948, the physical plant for KFUO(AM) was enlarged, and the Church, then called the "Evangelical Lutheran Synod of Missouri," applied for and received a license for Channel 256, 99.1 MHz in the FM band. The new station's call letters were KFUO-FM. Shortly thereafter, pursuant to an application, the licensee changed its name to the current "The Lutheran Church-Missouri Synod." With its new FM station, the Church gained the ability to broadcast around the clock. (Church Ex. 1, p. 7.)

16. From 1948 until 1974, religious and classical music programming was simulcast on KFUO(AM) and KFUO-FM, both of which were operated on a noncommercial basis. After 1974, because of a change in the FCC rules, KFUO(AM/FM) simulcast only on weekends. KFUO-FM became a full-power stereo broadcast operation in 1975, operating at 100,000 watts. (Church Ex. 7, pp. 2, 5.)

17. In March 1983, one month after the beginning of the License Term, the Church decided it would need to accept commercial advertising on the FM station. The AM station remained noncommercial. In the Church's view, voluntary contributions and bequests, which had been the source of both Stations' revenues up until then, were simply insufficient to support the Stations' operations. Throughout the License Term, however, members of the Board of Directors of the Church debated whether the Church should engage in commercial endeavors because the Directors believed that the main function of both Stations should remain as a ministry to support the Church and to nurture Christian faith. (Church Ex. 7, pp. 2, 5.)

18. The Church's Stations have had a spotless record with the FCC since commencing operation in 1924. With the exception of this proceeding, neither the FCC nor its predecessor agency had ever cited either of the Stations for any violations of rules or policies. (Church Ex. 7, p. 2; Tr. 796-98, 806-7.)

C. Organization of the Church's Broadcast Ministry

19. From the beginning of the License Term until 1986, the Stations were operated by the Church through its Board for Lutheran Radio, a Board directly accountable to both the Church's Board of Directors and the Church's Membership in Convention. A general manager of both Stations (the top staff position) served as the "Chief Executive Officer" ("CEO") of the radio operations. Because of the religious nature of the radio operations, the general manager was required to have theological education and expertise. The general manager of both Stations from approximately January 1983 to January 1986 was in fact a Church minister, Reverend Roger Abatie. During that time, the Executive Director of the Church's Board for Communications Services ("BCS") was Reverend Paul Devantier, who served as a liaison to the Stations. (Church Ex. 7, p. 7 and Att. 1; Joint Ex. 1; Tr. 876.)

20. In 1986, the Church assigned responsibility for the radio operations of the Stations to the BCS. The Board for Lutheran Radio became a standing committee of the BCS. As Executive Director of the BCS, Reverend Devantier became CEO of the Stations. As a result, since 1986, the requirement that the top staff position at the Stations be filled by someone with theological education and expertise was fulfilled through the Executive Director position. (Church Ex. 7, p. 7 and Att. 1; Tr. 876.)

21. As the Stations' CEO, Reverend Devantier visited the Stations approximately once a week, beginning in 1986, to oversee the Stations and to ensure that the Church's policies were observed. (Church Ex. 4, p. 11.) Reverend Devantier reported to the seven-member BCS, which in turn reported to both the Church's Board of Directors and its Membership in Convention. (Church Ex. 7, pp. 7-8 and Att. 1.)

22. In a staff reorganization at the Stations in 1987, the position of Director of Broadcast Ministries was created to supervise a separate general manager for each radio station. The Director of Broadcast Ministries reported directly to Reverend Devantier. (Church Ex. 7, p. 8 and Att. 1.) The only person to hold the position of Director of Broadcast Ministries during the License Term was Kenneth Lombardi, who held the position from approximately July 1987 to November 1989. (Joint Ex. 1.)

D. The Role of Concordia Seminary at the Stations

23. Since the inception of KFUO(AM), the Stations and Concordia Seminary have had a close relationship which, in the Church's view, has allowed each institution to play an integral role in the achievement of the other's goals. (Church Ex. 1, pp. 2-3; Church Ex. 7, p. 6.) KFUO(AM)'s first license was issued to the Seminary itself in 1925. (Church Ex. 1, p. 3 and Att. 1.) FCC records reflect that KFUO's license during the late 1920s was issued to the "Evangelical Lutheran Synod of Missouri, Ohio, and other States, through Board of Control of Concordia Seminary." (*Id.* at p. 4 and Att. 2, p. 5.) In an Order dated March 2, 1938, the Commission noted that KFUO(AM) was located on the grounds of the Seminary, and that the Station's operation was under the control of a radio committee of 10 members, 4 of whom were members of the faculty or Board of Control of Concordia Seminary. The Commission further observed that a sub-committee known as the KFUO Committee was in direct control of operations. (*Id.* at Att. 4, p. 5.) The Commission also noted in its Order that the talent used by KFUO(AM) was drawn almost entirely from the membership of the Church, the faculty and student body of the Seminary and prominent ministers, and the nationally known Concordia Seminary chorus was one of the two major sources of musical talent for KFUO. (*Id.* at Att. 4, pp. 6-7.)[1]

24. The Seminary has permitted KFUO and KFUO-FM to remain on its campus on a rent-free basis. (Church Ex. 1, pp. 4-5.) In addition, the Stations have obtained a supply of individuals with both Lutheran training and a personal commitment to the ministry of the Stations. Such individuals have been willing to work for the relatively low salaries that the Stations have been able to pay. (Church Ex. 7, p. 6.) KFUO(AM) and KFUO-FM have also been utilized for a work/study program for Seminary students in the use of radio as a medium in the Church's mission and ministry. (Church Ex. 1, pp. 7-8; MMB Ex. 24, p. 9; Tr. 783-84, 852-53.)

25. According to the Church, the history of the relationship between KFUO and the Seminary is exemplified by a May 1, 1928, issue of *The Gospel Voice*, a Station publication, describing how the musical talent of the Seminary had banded together into an organization which adopted the name "The Concordia Broadcasters." The express purpose of this group was to render regular services over KFUO(AM). In addition, the Concordia Seminary Publicity Committee cooperated with the Station in bringing KFUO radio activities before the public, members of the 1928 Postgraduate Class gave brief religious addresses over KFUO every Thursday afternoon at 3:00 p.m., and members of the Concordia Seminary Mission Society assisted KFUO in the work connected with the Bible class. (Church Ex. 1, pp. 4-5 and Att. 3.)

26. A June 1942 edition of *The Bond* stressed that KFUO "serves as a radio laboratory for the students, where they may acquire valuable radio experience which they can later employ in the local stations of their communities." (Church Ex. 1, p. 7 and Att. 5.) A September 1957 issue of the Church's *The Lutheran Witness* remarked that "[t]he Radio Student Training project, sponsored jointly by Concordia Seminary and the station, gives specialized instruction in radio and television to theological students." (*Id.* at p. 8 and Att. 6.) A May 1967 edition of *The Gospel Voice* stated that Seminary graduates "were reminded of the importance of radio in their total ministry to the needs of the people in their community." During the 1970s and into the 1980s, courses and workshops developed and taught by KFUO staff were offered by the Seminary to its students. (*Id.* at p. 8 and Att. 7.)

27. Throughout this relationship, including during the License Term, the Stations received letters in which Seminary students and other Church members expressed their desire to work at the Stations as an extension of their ministries. Even Seminary students or their spouses who lacked on-air skills offered their services. The Church be-

[1] The Church also applied for and received a license for a UHF television station in 1948. Although the facility was not constructed, the application highlighted the fact that the station was located on the Seminary grounds and that KFUO was broadcasting the devotional services of the Seminary on a regular basis. (Church Ex. 1, p. 7 n.1.)

lieved that such dedication to the Stations' mission has proven vital to its continued operation of the Stations. (Church Ex. 4, p. 4 and Att. 2.)

28. In the Church's opinion, the Seminary students' work for the Stations has been a part of their overall education as ministers. (Church Ex. 7, p. 6.) For example, Reverend Devantier, while a Seminary student, served as a part-time AM announcer at KFUO. After graduating, he became the Stations' Director of Development, served as general manager, and eventually became the Executive Director of the BCS, which oversaw the Stations for the Church. (Church Ex. 4, pp. 4-5.) Similar considerations applied, in the Church's view, to the spouses of Seminary students who were employed at the Stations. The Church believed that these individuals often played an important role as partners in their spouse's ministry after graduation, and that spouses have had the opportunity to learn and develop in that role as Station employees. (Church Ex. 7, p. 6.)

29. The general nature of the "arrangement" between the Stations and Concordia Seminary was summarized in the following answer by Reverend Dr. Ralph A. Bohlmann, who was president of Concordia Seminary from 1974 to 1981 and then President of the Church during the License Term (Church Ex. 1, p. 1):

> Q: Isn't it true that, that as president of Concordia Seminary, the seminary had an arrangement with the station to hire students and their spouses to work at the station?
>
> A: Yes, it is, but the nature of that arrangement perhaps is not a matter of written record. . . . [T]he seminary has a campus of 72 acres and the stations have a beautiful building on that campus. The students, the faculty members live on the campus for the most part over the years an, quote, arrangement, to use your words, has developed from the very beginning of the station. The seminary moved to that campus at about the time the station went into operation in the mid '20's. It, it is, it's part of the campus family and part of a campus community. It's assumed by the, those who manage the station's affairs and those who serve at the seminary that students, student wives in some cases, will be employed by the station whenever opportunities for employment present themselves. So, yes, if that qualifies as an arrangement. It did not need to become a legally binding document and, and to my knowledge there, there is no such document in the history of the seminary and the station, but a kind of word of mouth, a moral commitment to do that was self-understood, I believe, both at the station and at the seminary. And then in my capacity as president, I assume my predecessors did the same thing. Regular visits with station personnel and, and terms of various arrangements, for example the daily worship of the seminary is broadcast on the stations and so there was consultation from time to time as to how that might be enhanced, but employment practices, too. We were very, very happy that the station, over the years, employed many of our students, and that was an arrangement of sorts.

(Tr. 288-89.)

30. On January 2, 1990, the NAACP filed a Petition to Deny the Stations' applications for renewal of their licenses. (MMB Ex. 3.) The Church filed an Opposition to Petition to Deny and Response to Inquiry ("Opposition") on February 23, 1990. (Church Ex. 4, Att. 7, pp. 2.) The Opposition was prepared by Marcia A. Cranberg, an attorney with the law firm of Arnold & Porter, which represented the Stations. Ms. Cranberg had the primary day-to-day responsibility for serving the Stations' FCC regulatory needs. (Church Ex. 8, pp. 1, 6.) In the Opposition, the Church explained its relationship to the Seminary as follows:

> KFUO's studios are located on the campus of Concordia Seminary. KFUO pays no rent for these facilities. Given the noncommercial nature of the AM operation (and, until recently, of the FM as well), this arrangement is extremely important to KFUO's ability to continue to offer high quality broadcast service. Part of the arrangement has included reciprocal efforts by KFUO to provide broadcast training to Concordia students or their spouses through employment at the stations. Thus, as an accommodation to the Seminary, KFUO has tried to fill a number of the non-specialized positions at the stations with Seminary students or their spouses.

(Church Ex. 4, Att. 7, p. 17.)

31. In response to a Commission inquiry dated April 22, 1992 (MMB Ex. 5), the Church, in a letter dated May 12, 1992, stated: "[O]ur reciprocal arrangement with the Concordia Lutheran Seminary (which provides our office and studio space rent-free) requires that we make special efforts to employ Seminary students who have obtained the required knowledge of the religious format without resort to outside recruitment sources." (MMB Ex. 6, p. 3.)

32. In a Motion to Strike and Reply to Comments, filed September 21, 1992, the Church described the arrangement with the Seminary in the following manner:

> KFUO's studios and offices are housed free-of-charge [at the Seminary]. . . . The materials submitted by KFUO in this proceeding show that, despite the incentive for maintaining a synergistic relationship with the Seminary so as to receive certain much-needed benefits, KFUO recruited or hired through the Seminary for only five of 35 full-time hiring opportunities from October 1986 through January 31, 1990. . . . [Footnote] The remaining 85 percent of full-time job positions were recruited for and hired through a variety of other sources.
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> * * *
>
> [Footnote] In addition, KFUO attempts to satisfy the terms of its reciprocal arrangement with the Concordia Lutheran Seminary by allowing Seminary students who are studying for a theological Lutheran career to train as part-time announcers on KFUO-AM.

(MMB Ex. 11, p. 20.)

33. According to Ms. Cranberg, the "arrangement" between Concordia Seminary and the Stations was not reduced to writing and may not have been legally enforceable. In crafting pleadings she filed on behalf of the Church, Ms. Cranberg testified that she did not intend to imply that there was a written, legally enforceable contract, and had no intention of misleading the Commission into believing that such a formal contract existed. (Church Ex. 8, p. 8 n.3.)

34. During the License Term, Concordia Seminary students and their spouses held 21 part-time positions and 8 full-time positions. Of the part-time positions, 17 were AM announcers who, according to the Church, needed religious training. (Church Ex. 4, pp. 3-4.) All but one of the part-time Seminary students were hired for on-air jobs. (*Id.* at Att. 6, pp. 9-15; Tr. 503-7.) The part-time workers generally worked only 6 to 12 hours a week. (Church Ex. 3, p. 4; Church Ex. 4, pp. 22-23.) Seven of the eight full-time hires were Seminary wives; one full-time hire was a Seminary student. (Church Ex. 4, Att. 6, pp. 1-8.)

35. In the fall quarter of 1989, there were 10 minority students at the Seminary out of a total enrollment of 482. Of the 10 minorities, 3 were "Black Non-Hispanic." (NAACP Ex. 30.) According to Reverend Bryant E. Clancy, an African American and Director of the Church's Commission on Black Ministry (Church Ex. 2, p. 1), the average number of African American students at the Seminary between 1983 and 1990 was five (Tr. 722-23).

E. The Church's Policy of Nondiscrimination

36. Reverend Dr. Bohlmann, President of the Church during the License Term, testified that in his view the Church's whole reason for being has been to proclaim the Word of God, nurture its members, meet the needs of people, and welcome into its fold men and women of every race, color, and national origin. According to Reverend Dr. Bohlmann, the Church has always wanted its membership to grow, and for all of its ministries, broadcasting being one of the most important, to include all qualified persons without regard to race, color, or national origin. (Church Ex. 1, pp. 1-2.) In the view of Reverend Clancy, the 117-year history of the Church's work with African Americans demonstrates an aggressive attitude against racism and continuous outreach toward African American families. (Church Ex. 2, pp. 1-2.)

37. In 1953, the Church formed the Lutheran Human Relations Association of America for the purpose of making efforts to eliminate any segregation and discrimination. To further the presence of African Americans in the Church, the African American Mission Models Task Force was created in 1975. In 1977, the Church created the Commission on Black Ministry, which was designed to expand the Church's African American membership. (Church Ex. 2, p. 3.) In 1981, the Church's Synod in Convention passed Resolution 8-07, resolving "[t]hat we reaffirm our earlier statements against racism and violence and call upon our congregations to reaffirm clearly their affirmation of human life and dignity for all persons and all races." (Church Ex. 7, p. 8 and Att. 2.) In 1986, the Church publicly denounced apartheid as well as other forms of racial discrimination. (*Id.* at p. 8 and Att. 3.)

38. The Church has approximately 50,000 African American members out of total membership of 2.6 million. Approximately 86 African American Lutherans serve as pastors of congregations and 30 serve as college or seminary faculty and administrative staff members. The Church has approximately 100 white pastors who serve congregations with predominantly African American members and 3 Black pastors who serve congregations with predominantly white members. (Church Ex. 2, p. 1.)

39. For the past 20 years, the national Church leadership has included an African American Vice President of the Synod. African Americans have also served as Vice Presidents of regional districts, area circuit counselors and members of various district Boards of Directors. (Church Ex. 2, pp. 1-2.) Reverend Clancy believed the climate in the Church for his efforts on behalf of African Americans has been very supportive. (Tr. 723-24.)

40. There is minority representation at the primary and secondary schools operated by the Church. Specifically, the minority population of the Church's 1,079 early childhood centers, 988 elementary schools, and 62 high schools consists of 17% minorities, 7% of whom are African American. (Church Ex. 2, pp. 2-3.)

41. The Church has a long history of providing educational opportunities for minorities. For example, in 1888, Walther College, a Lutheran high school in St. Louis, was perhaps the first school in the city to make an effort to break down segregation by admitting an African American female student. She later graduated with honors. Currently, 17.9% of the students at the 12 campuses of Missouri Synod colleges, universities and seminaries are minorities, and more than half of these are African American. (Church Ex. 2, p. 2.)[2]

II. Equal Employment Opportunity at KFUO

A. Nondiscrimination and Affirmative Action at the Stations

42. From the beginning of the License Term, the Stations' personnel policies required employment on a racially nondiscriminatory basis. The Stations' personnel policies in effect in 1983 stated: "It is the policy of this Station, as set forth by the Board of Directors, to provide employment ... without regard to race, color, religion, national origin, sex or age, except where religious affiliation is a bona fide occupational requirement." The Stations' personnel policies also contained a commitment "to take affirmative actions to seek out individuals whose potential has not been developed, with the objective of assisting them to meet . . . standards" at a level consistent with the healthy growth of the Stations. (Church Ex. 4, p. 5 and Att. 3.)

43. By 1987, the Stations' personnel policies were controlled by policies in force at the Church, and included a commitment to equal opportunity. The policies recognized

[2] The colleges and universities are: (1) Concordia College, Ann Arbor, MI; (2) Concordia Lutheran College of Texas, Austin, TX; (3) Concordia College, Bronxville, NY; (4) Christ College Irvine, Irvine, CA; (5) Concordia University Wisconsin, Mequon, WI; (6) Concordia College, Portland, OR; (7) Concordia University, River Forest, IL; (8) Concordia College, St. Paul, MN; (9) Concordia College, Selma, AL; and (10) Concordia Teachers College, Seward, NE. The seminaries are: (11) Concordia Seminary, Clayton, MO; and (12) Concordia Theological Seminary, Fort Wayne, IN. (Church Ex. 2. p. 2.)

two basic concepts, nondiscrimination and affirmative action, while acknowledging that for certain positions the Church needed to seek out "individuals with specific religious training." The EEO policy stated:

> The recognition of nondiscrimination demands the elimination of all prohibited discriminatory conditions, whether purposeful or inadvertent. The Lutheran Church-Missouri Synod is pledged to the careful and systematic examination of all its employment policies to be certain that such policies do not operate to the detriment of any individual on the grounds of race, color, religion, sex, or national origin.
>
> Our commitment to Affirmative Action prompts us to do more than ensure neutrality with regard to race, color, religion, sex, or national origin. The Synod is pledged to programs which place special emphasis on our efforts to recruit, employ, and promote qualified members of all such groups.

(Church Ex. 4, pp. 5-6 and Att. 4.)

44. When he assumed the position as CEO of the Stations in 1986, Reverend Devantier took steps to assure that the Church's policy of non-discrimination and equal opportunity was in effect at the Stations. For example, he assured that the Church's Employee Handbook, containing a statement concerning Equal Employment Opportunity, was put into effect at the Stations and was distributed to all employees. (Church Ex. 7, pp. 8-9 and Att. 4, pp. 1, 27-28.) The Employee Handbook was published in October 1985, more than two and one-half years after the License Term began. (*Id.* at Att. 4, p. 1.) Reverend Devantier also visited the Stations' facilities approximately once a week to oversee the Stations and to ensure that the Church's policies were observed. (Church Ex. 4, p. 11.) For the implementation of the details of the Stations' EEO policies, Reverend Devantier relied on the operational chiefs at the Stations. (Church Ex. 7, p. 9.)

45. From his vantage point, Reverend Devantier believed that the Stations' operational supervisors were assuring that the Stations did not discriminate and were implementing the affirmative action efforts required by the FCC. He based these beliefs on the following (Church Ex. 7, pp. 9-10 and transcript pages cited):

> (a) He had been involved in hiring the Stations' managers and knew them to be competent, responsible people of good character. (Tr. 811-12.)
>
> (b) The absence of any complaints of discrimination.
>
> (c) When he had been general manager of the Stations in the 1970s, the Stations had always been committed to equal opportunity for all. Indeed, Reverend Devantier had promoted an African American woman, Lula Daniels, from secretary to a managerial position as Coordinator of Worship Programming. He had no reason to believe that the Stations' policies had changed from their commitment to equal opportunity employment at any time after his tenure as general manager.
>
> (d)He discussed with each of the general managers during the License Term the Stations' commitment to equal employment opportunity and the desirability of hiring minority employees. (Tr. 823-24, 826.) Based on these discussions, Reverend Devantier believed that the managers were committed to maintaining the EEO policies. Although no one was explicitly charged in a position description with noting the presence or absence of minority applicants at the Stations, managers were generally charged with day-to-day EEO compliance. (Tr. 819-21, 823-24.) The only manager who told Reverend Devantier that it was desirable to modify the Stations' EEO procedures was Thomas M. Lauher, who sent him two memorandums on the subject in March 1989.
>
> (e) Reverend Devantier knew the Stations had highly respected communications counsel, the firm of Arnold & Porter, because that firm had been the Stations' counsel when he was general manager. He believed that he would hear directly from the firm if FCC rules or policies changed in a way which would have required dramatic changes in the Stations' EEO program. He did not receive any such communication from counsel.

46. Dennis Stortz, Operations Manager for both Stations from 1978 to 1991 and also acting general manager for both Stations from July 1986 to May 1987, testified that, based on his observation and involvement in the personnel activities of the Stations, he believed the Stations never discriminated against anyone because of his or her race during the License Term. (Church Ex. 4, pp. 1-2.) Mr. Stortz believed that the Church's theology taught and encouraged "all persons to achieve their fullest individual potential in the life in God." Establishing barriers to that achievement by discriminating on the basis of race would have been contrary to those teachings as Mr. Stortz understood them, as well as to Mr. Stortz's personal beliefs. (*Id.* at p. 2.) Thomas M. Lauher, general manager of KFUO-FM from May 1987 until July 1989, testified that he had never seen any overt or intentional discrimination on the part of anyone associated with either KFUO(AM) or KFUO-FM. (Church Ex. 6, pp. 1, 3.)

47. Reverend Dr. Bohlmann, President of the Church during the License Term, testified that he had known both Reverend Devantier and Mr. Stortz for many years and that, in his opinion, they were honest and were individuals of the highest integrity who would never discriminate. (Church Ex. 1, p. 8.) On cross-examination by the NAACP's attorney, Reverend Dr. Bohlmann explained the basis of his beliefs about Reverend Devantier and Mr. Stortz:

> [A] president of a large organization like the Church body has to depend to a large extent on the character and demonstrated commitments, theological in this case as well as technical and professional, in choosing that particular person for that position. So the character and the quality of leadership that one can expect is, to a large extent, determined by the, the personal integrity and honesty and commitments of the designees. Paul Devantier, for example, was my student many years ago. When I was the president of the seminary, he was the manager . . . at the station with whom I consulted several times. And subsequently during my administration as president of the Church body, he served throughout most of that period as the, the Church body's chief executive in the entire area of communications, covering all of its, its districts, 30-some districts, its colleges, seminaries,

> its various entities. I knew him both personally and professionally as a man of, of deep commitment to the Church's own policies of nondiscrimination. In his own family life, pardon me, Paul, for saying this, his commitment is demonstrated by the fact that two of the members of his own household are bi-racial children, one adopted, one a foster child. The kind of commitment he has toward fair and just hiring practices and all other dimensions of the Church's posture is demonstrable, and in my position and helping the board to choose its chief executive, questions of honesty, character, and the like are very important. And . . . then . . . [with] Dennis Stortz, and the kinds of individuals that Paul [Devantier] would select as administrators of the, the the stations, would be directly influenced by his own posture.

(Tr. 278-79.) Reverend Dr. Bohlmann also testified that he was briefed frequently by Reverend Devantier as well as by the Stations' legal counsel, and assured himself in a general way that the Stations were complying with EEO requirements. (Tr. 283-85.) However, Reverend Dr. Bohlmann was not consulted with respect to the hiring of announcers, salespersons, receptionists, or other station personnel. (Tr. 285-87.)

48. Reverend Bryant Clancy, himself an African American and Director of the Church's Commission on Black Ministry, testified that, based on his experience in the Church, his opinion was that the Church would not discriminate on the basis of race in any of its ministries including the radio ministry, although he did not know the specifics as to how the Stations did their hiring during the License Term. (Church Ex. 2, pp. 1, 3; Tr. 719-20.) Reverend Clancy had been a guest on KFUO radio programs to inform the listeners of the goals and activities of the Commission on Black Ministry. In his contact with the Stations, he had not been aware of any instance of racial discrimination. Reverend Clancy also testified that he had known Reverend Devantier personally for years and that he believed Reverend Devantier to be "a man of outstanding integrity, fairness and service to the Church and all of God's children." (Church Ex. 2, p. 3.)

49. During the License Term, no past or then present employee or job applicant complained that the Stations discriminated against him or her on the grounds of race or religion. (Church Ex. 7, p. 10.)

B. Knowledge of Lutheran Doctrine as a Job Requirement

50. The Church believed during the License Term that many of the positions at KFUO(AM), as well as positions that served functions at both of the Stations, required a knowledge of Lutheran doctrine and philosophies. For example, in the Church's judgment, the station manager of KFUO(AM) needed to be familiar with the mission and doctrine of the Church because part of the manager's job was to ensure that the station presented Lutheran doctrine accurately. In the Church's view, the Director of Development and Assistant Director of Development also needed to understand the ministry of KFUO and its relation to doctrine and to the Bible because these people created the AM station's fund-raising letters and generally did fund raising. Indeed, it was the Church's position that it was desirable that a Lutheran pastor hold the Director of Development position. (Church Ex. 4, p. 7; Tr. 871-72.)

51. The Church's judgment was that it was also essential to have knowledge of Lutheran doctrine to be an announcer of religious programming on KFUO(AM). (Church Ex. 4, p. 7.) Virtually all announcers on the AM station presented worship events, religious discussion programs, or call-ins. (Tr. 871.) Again, the Church believed there was no substitute for knowledge of Lutheran doctrine for selecting and presenting program materials and for responding to caller inquiries. The Director of Audio Resources (title changed to Manager of Religious Programming in 1988) also needed substantial knowledge of the Lutheran mission and doctrine, in the Church's view. This person was responsible for managing the broadcasts of live worship services on KFUO(AM) from area Lutheran congregations, for producing that station's Christian music programs, for arranging for daily worship programs produced by that station, and for creating other worship program features produced and broadcast by KFUO(AM). (Church Ex. 4, pp. 7-8.)

52. The Church's position was that it was desirable to be an active member of an LCMS congregation for many jobs which, it believed, had a connection to the espousal of religious views. For example, Mr. Stortz testified that Church membership and resulting knowledge about the Church calendar and Church-related events was considered desirable for any receptionist, who would have worked for and served both of the Stations, because the receptionist interacted with religious listeners and potential donors, and sometimes scheduled people who were going to be on the air. (Church Ex. 4, p. 8; NAACP Ex. 39, pp. 1-2, 7-8; Tr. 494-98.) Other secretarial, clerical and engineering positions, as well as positions in management and the business department, also served both KFUO(AM) and KFUO-FM. (Church Ex. 4, p. 3; Tr. 618-19.)

53. It was also helpful, in the Church's view, for certain secretaries to be familiar with the Lutheran Church because part of their job was to contact pastors to enlist volunteers for "Share-A-Thons," which were on-the-air fund raising events. (Church Ex. 4, p. 7; Tr. 488.) Mr. Stortz believed that it was more effective to have Lutherans solicit donations from other Lutherans in connection with fund raising. (Tr. 500.) However, he acknowledged that a caller wishing to give money would not necessarily know if the person answering the telephone was a Lutheran. (*Id.*) Moreover, Mr. Stortz testified that certain secretaries gathered and conveyed information to pastors about the matters which they would be addressing on worship programs. (Tr. 734-35.) These secretaries also sometimes made decisions as to which pastor to schedule for a specific week, and it was "helpful" if the secretaries were familiar with the Lutheran calendar and teachings. (Tr. 734-36.) Although Mr. Stortz recognized that a person who was not familiar with the Lutheran Church could be trained to perform the Stations' secretarial and receptionist duties, he testified that such training could not be accomplished "in a day or a week or a couple of weeks[;] . . . to become comfortable with it[,] it would take longer than that." (Tr. 498-500.)

54. The record in this proceeding contained four job descriptions for the position of "Receptionist" (NAACP Ex. 35, pp. 4, 25; NAACP Ex. 36, p. 16; NAACP Ex. 39, pp. 7-8), six job descriptions for various secretarial positions (NAACP Ex. 35, p. 17; NAACP Ex. 36, p. 2; NAACP Ex. 39, pp. 1-2; NAACP Ex. 40, pp. 21-22, 23-24; NAACP Ex. 41, pp. 9-10), and one job description for "Secretary/Receptionist" (NAACP Ex. 41, pp. 16-17). None of these job descriptions referred to the secretary or reception-

ist performing any functions or having any responsibilities of a religious nature. One receptionist job description (dated October 1986) listed as an "Essential" position qualification: "An active member of a Lutheran Church-Missouri Synod congregation." (NAACP Ex. 39, pp. 7-8.) Two secretarial job descriptions (dated October 1986 and June 1989) listed as "Other Desirable" position qualifications:

> 1. A working knowledge of The Lutheran Church-Missouri Synod.
>
> 2. An active member of a Christian congregation, able to understand and demonstrate support for the purpose of The Lutheran Church-Missouri Synod.

(NAACP Ex. 39, pp. 1-2; NAACP Ex. 41, pp. 9-10.) Two other secretarial job descriptions (dated December 1985 and March 1987) listed as an "Other Desirable" position qualification: "Member of a congregation of The Lutheran Church-Missouri Synod." (NAACP Ex. 40, pp. 21-22, 23-24.) The Secretary/Receptionist job description (dated July 1989) listed as "Other Desirable" position qualifications:

> 1. An active member of a Lutheran Church-Missouri Synod congregation.
>
> 2. A working knowledge of The Lutheran Church-Missouri Synod.

(NAACP Ex. 41, pp. 16-17.)[3]

55. Mr. Stortz testified that familiarity with or membership in the Church would be "a desirable happening" for the Stations' engineers

> because the engineers go out to churches and do all the remote set-up of church services. They interact with the pastors at the church and schedule when things are going to happen and how they're going to happen and discuss the engineering technical venue of the operation so that the pastor knows what's going on and that the radio station knows what's going on.

(Tr. 500-1; *see also* Tr. 741-43.) However, Mr. Stortz was of the opinion that someone without a Lutheran background could also perform these duties. (Tr. 743.)

56. The record contained four job descriptions for the position of Chief Engineer (NAACP Ex. 35, pp. 14-15; NAACP Ex. 36, pp. 17-18; NAACP Ex. 39, pp. 9-11; NAACP Ex. 40, pp. 14-16), and two job descriptions for the position of Engineer (NAACP Ex. 35, p. 16; NAACP Ex. 36, p. 19). None of these job descriptions referred to the Chief Engineer or Engineer performing any functions or having any responsibilities of a religious nature. One Chief Engineer job description (dated October 1986) listed as an "Other Desirable" position qualification: "An active member of a Lutheran Church-Missouri Synod congregation." (NAACP Ex. 39, pp. 9-11.) Another Chief Engineer job description (dated June 1987) listed as an "Other Desirable" position qualification: "An active member of a Christian congregation." (NAACP Ex. 40, pp. 14-16.)

57. Mr. Stortz was also of the opinion that it was "desirable," but not absolutely necessary for the Stations' Business Manager to have Lutheran training or be a member of a Lutheran congregation. This was so, he stated, because the Business Manager "interacted on a daily basis with the . . . Lutheran church headquarters." (Tr. 744.)

58. The record contained three job descriptions for the position of "Business Manager" (NAACP Ex. 35, p. 1; NAACP Ex. 37, pp. 1-4; NAACP Ex. 39, pp. 12-13), two job descriptions for the position of "Manager-Business Services" (NAACP Ex. 35, pp. 23-24; NAACP Ex. 36, pp. 14-15), and one job description for the position of "Manager of Business Affairs" (NAACP Ex. 40, pp. 1-2). None of these job descriptions referred to these employees performing any functions or having any responsibilities of a religious nature. One Business Manager job description (dated October 1986) listed as an "Essential" position qualification: "An active member of a Christian congregation, able to understand and demonstrate support for the purposes of the Lutheran Church-Missouri Synod." (NAACP Ex. 39, pp. 12-13.) The job description for Manager of Business Affairs (dated March 1987) listed as a "Desirable" position qualification: "An active member of a Christian congregation, able to understand and demonstrate support for the purposes of the Lutheran Church-Missouri Synod." (NAACP Ex. 40, pp. 1-2.)

59 . Mr. Stortz testified that he did not think it was necessary for a janitor to be a member of the Lutheran Church. However, he believed it would be a "desirable" attribute and would be "a minor consideration" in hiring. (Tr. 501-2.)

60. The Church's February 23, 1990, Opposition to the NAACP's Petition to Deny contained a listing of those positions within the Stations' Top Four job categories for which theological training or background was an employment requirement.[4] These positions were: General Manager of KFUO(AM); Director of Religious Programming of KFUO(AM); Director of Development of KFUO(AM); Announcer/Program Director of KFUO(AM); Announcer for KFUO(AM); and Director of Broadcast Ministries for KFUO(AM). (Church Ex. 4, Att. 7, pp. 13-14, 24-25.)

61. However, the job descriptions contained in the record indicate that there were other Top Four positions, not mentioned in the Opposition, for which religious knowledge or active membership in a Christian or LCMS congregation was an "Essential" or "Other Desirable" employment qualification. These positions were: General

[3] There was no evidence that Mr. Stortz had any role in drafting these, or any of the other job descriptions contained in the record. With respect to the job descriptions in general, it is noted that no questions were asked about their adoption or contents, there was no testimony as to why some duties and functions were not included in the descriptions, and there was no evidence as to why certain qualifications were listed as "Essential" or "Other Desirable." Similarly, there was no evidence that all of the positions for which job descriptions existed were filled during the License Term, or that the descriptions were actually used for, or had a bearing on, any specific hiring decision.

[4] The term "Top Four job category" as used herein has the same meaning as in FCC Form 395-B, that is, Officials and Managers, Professionals, Sales, and Technicians.

Manager, KFUO-FM (NAACP Ex. 40, pp. 7-9; NAACP Ex. 41, pp. 1-3); Manager of Business Affairs for KFUO-FM (NAACP Ex. 40, pp. 1-2); Program Director, KFUO-FM (NAACP Ex. 39, pp. 16-18; NAACP Ex. 41, pp. 7-8); and Director of Administration for KFUO(AM) (NAACP Ex. 39, pp. 5-6). With the exception of one of the FM Program Director's job descriptions (NAACP Ex. 41, p. 7), none of the other job descriptions referred to these employees performing any functions or having any responsibilities of a religious nature (NAACP Ex. 39, pp. 5-6, 16-18; NAACP Ex. 40, pp. 1-2, 7-9; NAACP Ex. 41, pp. 1-3).

62. The Opposition also stated that the Chief Engineer and Business Director positions did not require religious training. (Church Ex. 4, Att. 7, p. 13 n.3.) However, as indicated above, two Chief Engineer and one Business Manager job descriptions included religious requirements. (NAACP Ex. 39, pp. 9-13; NAACP Ex. 40, pp. 14-16.)

63. Because of the need for knowledge of Lutheran principles for many positions, KFUO(AM) in particular relied heavily on employment advertising in Lutheran periodicals such as *The Lutheran Witness*. This newspaper was widely distributed to members of Church congregations, including its African American members. (Church Ex. 4, p. 12 and Att. 6, pp. 4, 5, 7; Tr. 750-51.)

64. In preparing and reviewing the Equal Employment Opportunity Program in the Stations' 1989 license renewal applications, Mr. Stortz did not believe that he needed to state explicitly that the Stations required knowledge of Church doctrine for certain positions. (Church Ex. 4, p. 18.) A sentence in the Program stated: "When vacancies occur, it is the policy of KFUO and KFUO-FM to seek out qualified minority and female applicants." (*Id.* at p. 17 and Att. 16, p. 7.) Mr. Stortz believed that this sentence was consistent with the use of various employment criteria, such as religious training or knowledge of classical music, to find "qualified" applicants. (*Id.* at p. 18.) Moreover, Mr. Stortz believed that the Commission was well aware that the Stations were licensed to a church, and it therefore never occurred to him that he needed to mention that theological training was necessary for certain jobs. Similarly, it did not occur to Mr. Stortz that he needed to mention explicitly the Stations' arrangement with Concordia Seminary. Again, in his view, the Commission was well aware that the Stations had a connection with the Seminary, especially given that KFUO(AM) had originally been licensed to the Seminary. (*Id.*)

65. Ms. Cranberg reviewed the EEO Program which had been sent to her by Mr. Stortz with the 1989 renewal applications for filing with the FCC. (Church Ex. 8, p. 2.) Although she was aware that, late in the License Term, the Stations raised questions with her about EEO requirements for religious stations (Tr. 1016-18), she did not focus on the fact that KFUO(AM) had a religious program format and there were likely to be requirements for knowledge of Lutheran doctrine for certain positions (Church Ex. 8, p. 2). Consequently, she did not question Mr. Stortz about whether KFUO should have language in the applications to reflect that likelihood. (*Id.*)

C. The Stations' Affirmative Action Efforts

66. The Equal Employment Opportunity Program filed by the Stations with their September 22, 1982, renewal applications stated, in pertinent part:

I GENERAL POLICY

It is the policy of KFUO and KFUO-FM to provide equal employment opportunity to all qualified individuals without regard to their race, color, religion, national origin or sex in all personnel actions including recruitment, evaluation, selection, promotion, compensation, training and termination.

It is also our policy to promote the realization of equal employment opportunity through a positive, continuing program of specific practices designed to ensure the full realization of equal employment opportunity without regard to race, color, religion, national origin or sex.

* * *

II RESPONSIBILITY FOR IMPLEMENTATION

Maurice Anderson, General Manager, is responsible for the administration and implementation of our Equal Employment Opportunity Program. It is also the responsibility of all persons making employment decisions with respect to recruitment, evaluation, selection, promotion, compensation, training and termination of employees to ensure that our policy and program is adhered to and that no person is discriminated against in employment because of race, color, religion, national origin or sex.

III POLICY DISSEMINATION

To assure that all members of the staff are cognizant of our equal employment opportunity policy and their individual responsibilities in carrying out this policy, the following communication efforts are made.

> The station's employment application form contains a notice informing prospective employees that discrimination because of race, color, religion, national origin or sex is prohibited and that they may notify the appropriate local, state, or federal agency if they believe they have been the victims of discrimination.

* * *

IV RECRUITMENT

With a small staff of employees, job vacancies occur infrequently. (During the past twelve months, for example, only two vacancies occurred and one part-time employee became a full-time employee. Consequently, little recruitment efforts were required.) When vacancies do occur, it is the policy of KFUO and KFUO-FM to seek out qualified minority and female applicants. We deal only with employment services, including state employment agencies, which refer job candidates without regard to their race, color, religion, national origin or sex.

When utilizing media for recruitment purposes, help-wanted advertisements always include a notice that we are an Equal Opportunity Employer and contain no indication, either explicit or implied, of a preference for one sex over another.

> We encourage present employees, particularly minority and female employees to refer minority and female candidates for existing and future job openings.

(MMB Ex. 1, pp. 5-6.) An EEO Program apparently filed by the Church sometime in 1983 included statements identical to those quoted above, except the name of "Rev. Roger Abatie" replaced that of Mr. Anderson. (Church Ex. 8, Att. 5, pp. 3-4.)

67. The Equal Employment Opportunity Program filed by the Stations in their September 29, 1989, renewal applications contained identical statements to those quoted above under the headings "General Policy," "Responsibility for Implementation," and "Policy Dissemination." However, Reverend Devantier's name and title were substituted for those of Reverend Abatie. Similarly, the second and third paragraphs under the heading "Recruitment" were identical in the 1982, 1983 and 1989 Programs, but the first paragraph under "Recruitment" in the 1989 Program stated:

> When vacancies occur, it is the policy of KFUO and KFUO-FM to seek out qualified minority and female applicants. We deal only with employment services, including state employment agencies, which refer job candidates without regard to their race, color, religion, national origin or sex. We contact the various employment services and actively seek female and minority referrals and we specifically request them to provide us with qualified female and minority referrals. See sample reply form attached.

The "sample" reply form stated: "This is to acknowledge that I have received a letter from Station KFUO-FM seeking female and minority referrals for job openings at the station[.]" and was signed on July 21, 1989, by a representative of Snelling & Snelling, Personnel Consultants, St. Louis, Missouri. (Church Ex. 4, Att. 16, pp. 6-8.)

68. Over the course of the License Term, the Stations' staff averaged 20 full-time employees. (NAACP Ex. 24; Church Ex. 10.) The Stations made 43 full-time hires during the License Term, and sought referrals for 30 (69.8%) of those hires, including 9 referrals from station employees. (Church Ex. 4, Att. 6, pp. 1-8.) KFUO-FM hired a minority female full-time salesperson for a Top Four job category position during the License Term. (*Id.* at p. 12; Tr. 762-63.) Of the Stations' 43 full-time hires, 25 (58.1%) were female and 7 (16.3%) were minority. (Church Ex. 4, Att. 6, pp. 1-8.) Of the 7 minority hires, 2 were hired after January 2, 1990, the date the NAACP filed its Petition to Deny. (MMB Ex. 3; Church Ex. 4, Att. 6, p. 8.)

69. During the License Term, KFUO(AM) hired to fill the following full-time positions: Acting Director of Development; Announcer (3 hires); Announcer/Program Director; Assistant Director, Development; Associate Director, Development; Director, Audio Resources; Director of Development and Public Relations; Receptionist; Religious Secretary; Secretary (3 hires); Secretary/Receptionist; and Station Manager. During the License Term, KFUO-FM hired to fill the following full-time positions: Announcer; Sales Worker (14 hires); Sales Worker/Manager; Secretary; and Station Manager. During the License Term, the following full-time positions, which served both KFUO(AM) and KFUO-FM, were filled: Assistant to Business Manager; Business Manager; Director of Broadcast Ministries; Maintenance; and Receptionist (5 hires). (Church Ex. 4, Att. 6, pp. 1-8.)

70. Over the course of the License Term, the Stations' staff averaged 11 part-time employees. (NAACP Ex. 24; Church Ex. 10.) The Stations made 41 part-time hires during the License Term, and sought referrals for 26 (63.4%) of those hires. (Church Ex. 4, Att. 6, pp. 9-15.) Of the 26 referrals, 21 (80.7%) were from Concordia Seminary. Of the Stations' 41 part-time hires, 41 (100%) were white, 7 (17%) were female, and none (0%) was a minority. (*Id.*)

71. As noted above, the Stations sought referrals for 30 of its 43 full-time hires during the License Term, and for 26 of its 41 part-time hires during that term. The number of referrals from secular sources (excluding referrals from station employees) is summarized in Table 1, below. (Church Ex. 6, Att. 6.)[5]

72. The FCC Form 395s filed by the Stations during the License Term reflected the data shown in Table 2, which appears on the next page. (NAACP Ex. 24, pp. 2, 5, 8, 12, 16, 20, 24, 28, 31, 33.) Also shown is data from the FCC Form 395 for the year 1990, which was filed after the close of the License Term. (Church Ex. 10, p. 3.)[6]

73. **February 1, 1983, to August 3, 1987.**[7] According to the Church, the Stations struggled financially during the License Term. (Church Ex. 4, p. 6.) For example, in the fiscal year ("FY") ending June 30, 1983, the Stations had a $120,383.74 operating deficit on gross revenues of $465,131.46. (*Id.* at Att. 5, pp. 1-2.) In the FY ending June 30, 1984, the operating deficit was $148,972.23 on gross revenues of $584,356.94. (*Id.* at Att. 5, p. 4.) In the FY from July 1, 1984, to June 30, 1985, income on commercial KFUO-FM was less than $250,000 while total expenditures on both stations exceeded $819,000. Legacies and bequests of approximately $475,000 allowed the Stations to show a surplus of about $318,000. (*Id.*) Mr. Stortz testified that due to these financial problems, the Stations did little or no employment advertising during the first several years of the License Term. This was so because there were fewer job openings and fewer resources. Instead, the Stations relied on "informal sources" such as referrals by current employees or contacts at local Lutheran churches or agencies to find applicants who were willing to work for jobs that paid less than the broadcast norm at the time. (*Id.* at pp. 6-7; Tr. 485-87.)[8]

TABLE 1

Year	Full-time Hires	Part-time Hires	Total Hires	Full-time Hires for which Secular Sources were Contacted	Part-time Hires for which Secular Sources were Contacted	Total Hires for which Secular Sources were Contacted
1983	1	1	2	0	0	0
1984	3	4	7	0	0	0
1985	5	9	14	1	0	1
1986	3	3	6	1	0	1
1987	10	6	16	4	1	5
1988	7	10	17	0	0	0
1989	11	7	18	2	1	3
1990	3	1	4	3	0	3
Total	43	41	84	11	2	13

[5] Data for 1983 includes only the period from February 1 through December 31. Data for 1990 includes only the period from January 1 through January 31.

[6] The Stations used a two-week reporting period ending January 31 of each year. The first such period during the License Term was reported in the Stations' 1984 FCC Form 395-B. (Church Ex. 4, p. 14.)

[7] This period runs from the beginning of the License Term until the effective date of the FCC's *Report and Order* amending its rules regarding Equal Employment Opportunity in MM Docket No. 85-350. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) ("*Equal Opportunity Rules for Broadcasters*").

[8] One of the NAACP's rebuttal witnesses, Richard J. Miller, former owner of station KRJY(FM), St. Louis, Missouri, executed an affidavit on February 5, 1990, in which he vouched for the accuracy of the facts contained in an opposition to a petition to deny filed by the NAACP against KRJY ("KRJY Opposition"). (NAACP Ex. 12; Church Ex. 12, p. 60.) In the

TABLE 2

Year	Full-time, Top Four Category	Full-time, Top Four Category	Total Full-time	Total Full-time	Full-time and Part-time	Full-time and Part-time
	Number of Minorities	Number of Employees	Number of Minorities	Number of Employees	Number of Minorities	Number of Employees
1983	1	14	1	17	1	24
1984	1	15	1	18	1	26
1985	1	15	2	17	2	27
1986	0	14	1	17	1	29
1987	0	16	0	18	0	28
1988	0	19	0	23	0	33
1989	1	22	1	26	1	41
1990	0	20	2	27	2	45

74. However, the record also reflected that in the FY ending June 30, 1986, the Stations had a positive operating balance of $254,212.19 on gross revenues of $1,248,245.99. (Church Ex. 4, Att. 5, p. 6.) Similarly, in the FY ending June 30, 1987, the Stations earned $147,128 on gross revenues of $1,090,656. (*Id.* at Att. 5, p. 13.) In the 1982-83 FY, the Stations expended $152,035 for administrative and general services. (*Id.* at Att. 5, p. 2.) In the FY 1983-84 such expenditures totalled $93,049; in FY 1984-85 they totalled $114,765; in FY 1985-86, the total was $71,436; and in FY 1986-87, the administrative and general expenditures were $62,492. (*Id.* at Att. 5, pp. 4, 6, 13.)

75. The Stations hired 19 full-time employees between February 1, 1983, and August 3, 1987. Included among these employees were three African American women, Ruth Clerkly, Helen Richardson, and Lisa Harrison, who were hired in July 1984, March 1985, and August 1985, respectively. (Church Ex. 4, p. 6 and Att. 6, pp. 1-4.) Thus, over 15% of the full-time hires in this period were minorities.

76. Lula Daniels, an African American woman who served as Coordinator of Worship Programming from before the beginning of the License Term until she died on April 17, 1985, referred Ms. Clerkly and Ms. Richardson through contacts at a local parish Church. Ms. Daniels had been promoted from a secretarial position by Reverend Devantier. (Church Ex. 4, Att. 6, p. 1; Church Ex. 7, p. 9; Tr. 746-49, 864-65.) Ms. Daniels and others were "part of a network of congregations and Lutherans in the community . . . who by word of mouth would identify individuals who may be qualified for positions at KFUO or who would alert those looking for positions to apply at KFUO." (Tr. 865.) Ms. Harrison's referral source was "Station Employee." (Church Ex. 4, Att. 6, p. 2.)

77. Using these Lutheran sources and minority and nonminority staff referrals, as of January 31, 1983, the representation of minorities on the KFUO staff was 37.7% of the minority representation in the local work force overall (37.7% of "parity"), and 45.8% of parity in the Top Four job categories.[9] As of January 31, 1984, the Stations were at 35.6% of parity overall for minorities and 42.7% of parity for minorities in the Top Four job categories. By January 31, 1985, the Stations were at 75.4% of parity overall for minorities and 42.7% of parity for minorities in the Top Four job categories. On January 31, 1986, the Stations slipped to 37.7% of parity overall and, with the death of Ms. Daniels, no longer had any African American employees in the Top Four job categories (0% of parity).

KRJY Opposition, it was stated that KRJY, in filling vacancies for full-time positions, recruited by consulting resumes on file, hiring individuals who applied just before openings became available, hiring former employees, accepting the recommendations of other companies in the industry, or seeking the recommendations of employees. (Church Ex. 12, p. 8.) KRJY argued that these efforts succeeded in creating opportunities for minorities. (*Id.* at p. 9.)

[9] The St. Louis, Missouri-Illinois Metropolitan Statistical Area, where the Stations are located, included 43.2% females and 15.6% minorities. (*HDO*, 9 FCC Rcd at 917 n.6, official notice taken.)

As of January 31, 1987, the Stations had no minority employees and were, therefore, at 0% of parity overall and in the Top Four job categories. (Church Ex. 4, Att. 12, pp. 1-2.)

78. During this period, the Stations employed three full-time African American employees who were not employed during the weeks used to complete FCC Forms 395-B, *i.e.*, the last two weeks of January of each year. Consequently, the parity analyses above understate the Stations' minority hiring. The minority employees were: Ruth Clerkly, who was hired July 30, 1984, and left KFUO on December 26, 1986 (did not appear in the 1984 employment report); Helen Richardson, who was hired on March 25 or 26, 1985, and left KFUO on August 31, 1985 (did not appear in any employment report); and Lisa Harrison, who was hired on August 28, 1985, and left KFUO on January 10, 1986 (did not appear in any employment report). (Church Ex. 4, p. 14 and Att. 6, pp. 1-2; MMB Ex. 6, pp. 6-7.) All three left for job opportunities outside the field of broadcasting. (Church Ex. 4, Att. 7, p. 10 n.2.)

79. Beginning in mid-to-late 1985, the Stations began to use commercial advertising to recruit employees. (Church Ex. 4, Att. 6, p. 2.) From mid-to-late 1985 to August 3, 1987, the Stations placed advertisements in the *St. Louis Post Dispatch* and *Broadcasting* magazine for 4 of their 11 full-time hires. (*Id.* at Att. 6, pp. 2-4.)[10] In mid-to-late 1985, for example, the Stations advertised their Business Manager opening in the *St. Louis Post Dispatch*. (*Id.* at Att. 6, p. 2.) Likewise, in August 1987, the Stations advertised in the *St. Louis Post Dispatch* for salespersons. The Stations also advertised in *Broadcasting* magazine for a Sales Worker/Manager for the FM station, a Station Manager for the FM, and a Director of Broadcast Ministries for both stations. (*Id.* at Att. 6, pp. 3-4.)

80. Mr. Stortz testified that the Stations' policy was to state "in every advertisement" that they were Equal Opportunity Employers. (Church Ex. 4, p. 12 n.3.) A similar representation was made in the Equal Employment Opportunity Programs filed by the Stations in 1982 and 1983. (Church Ex. 8, Att. 5, p. 4.) The record in this proceeding contained the texts of four advertisements apparently placed prior to the date the NAACP filed its Petition to Deny. (Church Ex. 4, Att. 9, pp. 1, 2, 3, 8; MMB Ex. 6, p. 4.) Only one of the four included a statement that the Stations were an Equal Opportunity Employer. (Church Ex. 4, Att. 9, p. 2.) According to Mr. Stortz, any omission of the notice was "an inadvertent error." (*Id.* at p. 12 n.3; Tr. 776-81.)

81. The Stations continued to have their need for knowledge of Lutheran principles for certain positions. Accordingly, KFUO(AM) in particular relied heavily on employment advertising in periodicals such as *The Lutheran Witness*, which was widely distributed to members of LCMS congregations, including the Church's African American members. (Church Ex. 4, p. 12; Tr. 750-51.) *The Lutheran Witness* was used as one of the recruitment sources for the following three full-time positions: Director of Broadcast Ministries; Announcer/Program Director of the AM station; and AM Station Manager. All three of the individuals hired to fill these positions were white (Ken Lombardi, Reverend Mark Spitz, and Reverend David Schultz). (Church Ex. 4, Att. 6, pp. 4, 5, 7.)

82. Beginning in January 1987, the Stations also posted all openings at the Church's International Center ("Center"), whose employees were approximately 11.5% minority. (*Id.* at p. 12 and Att. 6, pp. 3 and 11 n.*.) The Center was the Church's headquarters (*HDO* at para. 12, official notice taken), and all of the employees of the Stations were themselves employees of the Center (MMB Ex. 14, pp. 23-24 n.6). The Center was used as one of the recruitment sources in filling three full-time and two part-time positions. The full-time positions were: Assistant to Business Manager of both stations; Business Manager of both stations; and Sales Worker/Manager of the FM station. The part-time positions were: Office Support for both stations; and AM Announcer. All five of the individuals hired for these positions were white (Steven Benko, Daryl Haake, Bern Hentze, Eric Dingler, and Steve Myrick). (Church Ex. 4, Att. 6, pp. 1-3, 10, 11.)

83. Beginning no later than 1987, the Stations also used the Broadcast Center in St. Louis as one of the recruitment sources for two full-time sales workers for the FM station, one part-time announcer for the AM station, and one part-time announcer for the FM station. All four of the individuals hired for these positions were white (James Bebo, Sharisse Bush, Steve Myrick, and Robert Armbruster). (Church Ex. 4, pp. 14-15 n.5 and Att. 6, pp. 6, 7, 11, 14.) According to Mr. Stortz, the Broadcast Center was the only broadcast trade school in St. Louis and was approximately 7% minority (5.9% African American) in 1989. (*Id.* at pp. 14-15 n.5; Tr. 613-14.)[11]

84. The Stations were unable to attract new African American employees in 1986 or in the period January 1 to August 3, 1987. As noted above, as of the pay period ending January 31, 1987, the Stations no longer had any African American employees. (Church Ex. 4, Att. 12, p. 3; NAACP Ex. 24, pp. 22-29.) This resulted from the death of Ms. Daniels in April 1985, the departure of Ms. Richardson in August 1985, the departure of Ms. Harrison in January 1986, and the departure of Ms. Clerkly in December 1986. (Church Ex. 4, Att. 6, pp. 1-2 and Att. 7, p. 10; Church Ex. 7, p. 9; MMB Ex. 6, pp. 6-7.) In this connection, Ms. Clerkly was recommended and "considered for a management-level position at the station but unfortunately left [KFUO's] employ before [it was] able to" promote her. (Tr. 883.)

85. During the License Term, the Stations' communications counsel, Arnold & Porter, sent to various general managers at KFUO, as well as to other broadcast clients, several letters relating to the Commission's EEO policies. The EEO letters were included among a large number of letters over the years notifying Arnold & Porter's clients of regulatory developments at the Commission. In general, these letters were sent to all of the firm's broadcast clients

[10] In the KRJY Opposition, Richard J. Miller cited advertisements in the *St. Louis Post Dispatch* as a good source for minority recruitment. The KRJY Opposition stated that the weekday edition of the *Post Dispatch* reached 51.2% of the St. Louis African American population, and the weekend edition reached 59.3% of that population. (Church Ex. 12, p. 7.)

[11] In the KRJY Opposition, the Broadcast Center was cited as a "major source" of minority referrals for Mr. Miller's station in the St. Louis market. (Church Ex. 12, p. 7.)

as a way of keeping them up-to-date on developments. (Church Ex. 8, pp. 2-3.) According to Mr. Stortz, the Stations paid the law firm for these letters. (Tr. 550.)

86. Certain of the Arnold & Porter letters related to the Commission's EEO reporting procedures. For example, in December 1985, the law firm wrote to Reverend Roger Abatie, then the general manager of the Stations, informing him about an FCC rulemaking concerning EEO reporting procedures. (Church Ex. 8, pp. 2-3 and Att. 1; Joint Ex. 1.) A March 1986 letter to Emil Wilde, then an interim co-manager of the Stations, enclosed information from the National Association of Broadcasters ("NAB") regarding its employment clearinghouse for minority and female hiring. (NAACP Ex. 42; Joint Ex. 1.) A November 1986 letter to Mr. Stortz enclosed the Commission's proposal for a new form of EEO reporting. (NAACP Ex. 43, p. 5.) In June 1987, the law firm sent to Mr. Stortz copies of the full text of the *Report and Order* in *Equal Opportunity Rules for Broadcasters*, released on June 12, 1987, and effective on August 3, 1987. In its cover letter, the subjects which were explicitly described related to new EEO reporting requirements and forms. The law firm explained that Appendix B of the *Report and Order* outlined in detail the EEO program which every station was required to adopt, but made no attempt to summarize those requirements. Instead, Arnold & Porter referenced the appropriate pages, and urged the clients themselves to review the provisions so that they would know what was required. (Church Ex. 8, p. 3 and Att. 2.)

87. In Mr. Stortz's view, all of Arnold & Porter's letters appeared to be form letters, presumably sent to all of the law firm's FCC clients. Mr. Stortz believed that most dealt with changes in the forms to be used when making EEO filings. Nothing in them appeared to Mr. Stortz to alert the Stations to any particular EEO deficiency they had or to deal with the subject of religious qualifications for certain jobs. (Church Ex. 4, p. 13; Tr. 549-50.) Mr. Stortz testified that he read the letters addressed to him and passed them on to the station managers. (Tr. 610-11.)

88. **August 3, 1987, to February 1, 1990.** For approximately the first year after the effective date of the FCC's revised EEO rules, *i.e.*, from August 3, 1987, to September 1, 1988, the Stations continued to rely principally on employee referrals, resumes on file, Lutheran publications, and advertisements in *Broadcasting* magazine in making nine full-time hires. (Church Ex. 4, Att. 6, pp. 4-5.) As of the pay period ending January 31, 1988, the Stations had no minority employees. (*Id.* at Att. 12, p. 3; NAACP Ex. 24, pp. 30-31.) However, the FM station made an effort to hire an African American or Hispanic salesperson, and did in fact hire Caridad Perez, a Hispanic female, in March 1988. (Church Ex. 4, p. 12 and Att. 6, p. 5; Tr. 762-63.) Ms. Perez's referral source was a "Resume on File." (Church Ex. 4, Att. 6, p. 5.)

89. During this period, the Stations continued to struggle financially. In the FY ending June 30, 1989, the Stations' expenses exceeded their revenues by $143,472. The Stations' total operating loss was reduced by the receipt of $441,598 in legacies and bequests. (Church Ex. 4, Att. 5, p. 43.) The FY ending 1988 was similar. The Stations had an operating loss of $173,851 even considering legacies and bequests of $341,094. (Church Ex. 4, Att. 5, p. 33.)

90. Thomas M. Lauher was the general manager of the FM station from approximately May 1987 to July 1989. (Church Ex. 6, p. 1; Joint Ex. 1.) Mr. Lauher was a non-Lutheran whose background was in broadcasting and advertising. He had a "strong interest" in classical music. (Church Ex. 6, p. 1; Tr. 134-35.) Mr. Lauher did not recall being given any instructions when he was first hired that minorities, Lutherans, persons with Lutheran training, Seminary students, or their spouses should be given preferences in hiring. (Tr. 134-35, 139-40.) Mr. Lauher testified that from the beginning of his term as general manager he noticed that, although there were a variety of men and women working at the station, there were no minorities. (Tr. 143-44.) He determined that he wanted to hire minorities. (Tr. 140.)[12]

91. In initiating the process of hiring salespersons for the FM station, Mr. Lauher contacted the St. Louis Broadcast Center and placed advertisements in various publications including *Broadcasting* magazine and the *St. Louis Post Dispatch*. (Church Ex. 6, p. 1.) In Mr. Lauher's view, the Broadcast Center was the best of its kind in training people to become broadcasters and was an Equal Opportunity Employment source. (Tr. 141.) He recalled referrals of applicants from the St. Louis Broadcast Center, and noted that he had talked to a variety of candidates in an effort to hire a variety of people, including minorities. (Church Ex. 6, p. 1.)

92. In April 1988, Arnold & Porter sent to Mr. Stortz a one-page letter beginning: "While the FCC has in recent years taken a more relaxed approach to enforcement of a number of its rules, the enclosed FCC release indicates that the Commission is still prepared to enforce its equal employment opportunity requirements." With regard to a condition which the Commission had recently imposed on a station in North Carolina, the law firm noted that:

> . . . While the condition is not onerous . . . it is inconvenient, and something of a "black mark" on the station's record.
>
> This action might serve as a reminder to review the FCC's rules pertaining to equal employment opportunities in order to ensure compliance with these requirements.

(Church Ex. 8, pp. 3-4 and Att. 3.)

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[12] Mr. Lauher's original written testimony stated, in connection with the hiring of salespersons at KFUO-FM, that the Stations "wanted to hire a variety of people and wanted to hire *a minority*." (Church Ex. 6, p. 1, emphasis added.) At the hearing, Mr. Lauher testified that the draft of his testimony, which he had prepared, stated that the Stations wanted to hire "minorities" for sales positions, and that the language, "a minority," was a typographical error. (Tr. 103-6, 125-26.) This testimony was credible, especially because a later sentence in Mr. Lauher's testimony states: "As I have mentioned, we had minority and female employees during the period that I worked at KFUO-FM and the station actively sought to obtain minority and female *employees*." (Church Ex. 6, p. 3, emphasis added.)

93. In the fall of 1988, Mr. Lauher attended a Missouri Broadcasters Association meeting. The meeting was essentially a license renewal seminar to inform broadcasters of the FCC's then-current requirements, including EEO requirements. According to Mr. Lauher, the message that came through during that seminar was "don't be lulled into complacency because there is deregulation." After attending this seminar, Mr. Lauher decided to review the station's compliance status, which included compliance with the FCC's EEO requirements. Mr. Lauher also had discussions with Ms. Cranberg concerning the Commission's EEO requirements. (Church Ex. 6, p. 2; Church Ex. 4, p. 12; Tr. 144.)

94. During Mr. Lauher's review, continuing from the fall of 1988 until April 1989 (Church Ex. 6, pp. 2-3), the Stations continued to rely on employee referrals, resumes on file, and the St. Louis Broadcast Center for five full-time hires (Church Ex. 4, Att. 6, pp. 5-6). None of the five was a minority. (*Id.*) As of the pay period ending January 31, 1989, however, after Ms. Perez was hired as a salesperson, the Stations' full-time minority employment was at 29.1% of parity in the Top Four job categories and 24.7% of parity overall. (*Id.* at Att. 12, p. 4; NAACP Ex. 24, pp. 32-33.)

95. On November 1, 1988, Arnold & Porter sent to the Stations a letter informing them of the decision of the U.S. Court of Appeals for the D.C. Circuit in *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988), wherein the Court ordered the Commission to hold a renewal hearing on EEO and misrepresentation issues. The law firm noted that "[t]he decision makes it likely that the FCC will consider more carefully in the future renewal challenges based on EEO grounds." (Church Ex. 8, p. 4 and Att. 4.)

96. After receiving Arnold & Porter's November 1, 1988, letter, Mr. Lauher made inquiries to Ms. Cranberg concerning the FCC's renewal requirements. (Church Ex. 8, p. 4; Tr. 1008-9, 1035.) On December 20, 1988, Ms. Cranberg sent Mr. Lauher a copy of the FCC's EEO rules, copies of KFUO's Annual Employment Reports for the years 1986 to 1988, and a copy of the Stations' most recent EEO Program. Ms. Cranberg told Mr. Lauher in this letter that she had been assured by FCC staff that a single EEO program filed by KFUO(AM) and KFUO-FM would be acceptable. (Church Ex. 8, p. 4 and Att. 5.) Mr. Lauher then reviewed the Stations' existing EEO program. (Tr. 136-39.) Ms. Cranberg believed that Arnold & Porter's letter of December 20, 1988, was the first time that the firm had addressed any EEO issues specific to KFUO, as opposed to its other broadcast clients, during the License Term. (Church Ex. 8, p. 4.)

97. On February 28, 1989, Arnold & Porter sent a letter to Mr. Stortz enclosing a Commission order concluding that broadcasters were permitted to maintain information concerning the race and sex of job applicants, and clarifying that licensees were required to report the number of qualified female and minority referrals they received. The letter also noted that stations which received applications by mail should make an effort to determine the race or sex of the applicant. The penultimate paragraph of the letter stated:

> You should be aware that the FCC is increasingly scrutinizing the recruitment practices of licensees to determine whether stations are complying with applicable equal employment opportunity requirements. Consequently, it would be wise for all licensees to carefully review their procedures for recruiting qualified minority and female applicants, and for retaining information on the sex and race of referrals to ensure that these procedures are effective and in compliance with applicable law.

(NAACP Ex. 46.)

98. As a result of his "on-going personal review and reading, attendance at two different renewal seminars, consultation and communication with Arnold & Porter and conversations with employees regarding past practices," Mr. Lauher prepared a memorandum to Reverend Devantier, the Stations' CEO, dated March 9, 1989, regarding "License Renewal." (Church Ex. 7, Att. 5, p. 1; Church Ex. 6, p. 2.) The memorandum attempted to give a "comprehensive review of performance, recommendations for improvements, and an outline of areas in which there [was] concern" in connection with the forthcoming license renewal. (Church Ex. 7, Att. 5, p. 1.) All such concerns were included in his report; Mr. Lauher knew of no others. (*Id.*) Mr. Lauher continued:

> The report and accompanying material provides background, outlines potential problems, addresses implications and offers solutions as we move into the critical license renewal time. We are taking action now to address specific concerns outlined below. Failure to do so could create significant jeopordy [sic] in license retention. If the concerns are not addressed quickly, the worst possible consequence is loss of license.

(*Id.* at Att. 5, p. 2.)

99. With respect to "EEO Compliance," the memorandum stated:

> This is the most critical area in license renewal. As Matthew Leibowitz said at the Missouri Broadcasters Association fall seminar on renewal: "Numbers do not work anymore. Now the FCC looks for affirmative action based on the EEO program model currently on file as developed by the station. The question is: Is the station following its own plan?" Marsha [sic] Cranberg agrees with the seminar view. As described below there are plenty of areas for improvement in our compliance. At the time the AM and FM operations were absorbed into the Synod[,] certain procedures, forms, job descriptions, etc. were introduced which inadvertently put the stations in a non-compliance situation.
>
> At the very least separate employment applications and hiring criteria should be in place for KFUO-FM (also KFUO-AM). Cranberg stated that even a requirement that an individual be a Christian would be deemed to have racial overtones.
>
> * * *
>
> All commercial broadcast license holders are subject to the same rules and regulations. As Marsha [sic] Cranberg of Arnold & Porter indicated in a telephone conversation: "The better part of safety is to comply with EEO for both FM and AM unless a reasonable argument with respect to AM can be ad-

vanced *and* the commission [sic] has previously waived requirements for similar situations." She knows of no similar situations that might apply.

. . . Cranberg recommends separate EEO Programs for FM and AM. She says that although a single EEO Program could suffice it "would make sense, especially in light of specific AM religious considerations in hiring" to separate the EEO Programs at the next filing (May [sic], 1989).

The NAB Legal Guide states: " . . . broadcasters are held to a higher EEO standard than most other private employers. Unlike most other businesses, broadcasters must comply with EEO requirements, not only as a matter of federal law, but also because the FCC reviews station compliance as part of the license application and renewal process." The guide explains the FCC can and does review broadcasters' EEO records periodically. If the record is thought to be inadequate, the FCC may take various actions, including denial of license renewal.

I have discoverd [sic] we are operating in violation of our own policy as currently on file. I have reason to believe this applies to the AM operation as well as the FM operation.

I have taken steps in good faith to assure full compliance in FM. I shared with Jerry Housholder those steps taken on FM.

(Church Ex. 7, Att. 5, pp. 5-8, emphasis in original.)[13]

100. Mr. Lauher specified in his memorandum three areas in which he believed that the Stations' "performance" differed from their "EEO promises." (Church Ex. 7, Att. 5, p. 8.) Each specified area related to forms and job descriptions, and not to the Stations' recruitment efforts or their policy of nondiscrimination. The areas specified were:

(a) First, the station's EEO Program on file at the FCC continued to show that Reverend Abatie, a former general manager of KFUO(AM) and KFUO-FM, was responsible for administration and implementation of the EEO program. A new person or persons needed to be named, and a decision needed to be made about whether one person should be responsible for both stations. (Church Ex. 8, Att. 5, p. 3; Church Ex. 7, Att. 5, p. 8; Tr. 151-52.)

(b) Second, the employment application form in use at the Stations did not contain the statement which the EEO Programs on file at the Commission represented the form would contain. (Tr. 156.) Specifically, the Stations' 1982 and 1983 EEO Programs had stated: "The station's employment application form contains a notice informing prospective employees that discrimination because of race, color, religion, national origin or sex is prohibited and that they may notify the appropriate local, state, or federal agency if they believe they have been the victims of discrimination." (Church Ex. 8, Att. 5, p. 9.) As Mr. Lauher stated in his memorandum, however: "Somehow, this was dropped at some point when revised application forms were printed." (Church Ex. 7, Att. 5, p. 9.)[14] Mr. Lauher testified at the hearing that the quoted statement "was a clear part of the policy but it had been in some manner inadvertently dropped from this application." (Tr. 164.)

(c) Third, there was a problem with job descriptions, which needed to be "job specific, held to a minimum and . . . completely objective." According to Mr. Lauher, the job descriptions at the Stations were reviewed and changed where necessary to be sure none included subjective considerations and all essential position qualifications were job specific. (Church Ex. 7, Att. 5, pp. 9-10.)

101. At the hearing, Mr. Lauher testified that he had another area of concern. That is, the employment application form in use at both Stations stated: "Because we are a church body, the Lutheran Church-Missouri Synod retains the right to give preference in the hiring of persons who are members in good standing of an LCMS congregation." In addition, the form asked applicants to state their religious affiliations. Mr. Lauher was concerned because these portions of the application appeared to violate the Stations' stated policy to give all qualified applicants an equal opportunity for employment. (MMB Ex. 25, p. 1; NAACP Ex. 32, pp. 2, 14, 20; Tr. 153-56, 161.)

102. Mr. Lauher further testified that his "concern at the time [he] prepared the memorandum was that a common application form was used for both the AM and FM stations and that within the form there was some language relating to theological experience that might not be appropriate for all hires." He testified that he was "also concerned that some of the job descriptions for the FM station might not reflect [the Stations'] EEO policies because the opening paragraphs spoke about serving the Lutheran Church." (Church Ex. 6, p. 2.) In general, Mr. Lauher was concerned in 1989 that a joint EEO program for both KFUO(AM) and KFUO-FM "might create a difficulty in impression, confusion because there were some, as Marcia [Cranberg] suggested, legitimate reasons for the AM station to ask questions of a religious nature, nature for certain ... positions ..., although the FM would not be hiring people with, with that kind of background or requirement." (Tr. 152.)

103. Mr. Lauher also stated in his testimony that his March 9, 1989, memorandum did not deal with recruiting efforts. He explained that KFUO-FM had increased the number of women employees at the station and had "minority representation," namely, Ms. Perez, who was Hispanic. (Church Ex. 6, p. 2; Tr. 193-94.) Mr. Lauher testified: "I think in the, in the few hires that had been made at the time I was there that [the Stations] . . . had hired a minority and we had hired women . . . I think the FM station had, had been doing what it should do." (Tr. 175.) He testified that when he stated in his memorandum that "we are operating in violation of our own policy as currently on file," he did not mean that the Stations were

[13] Jerry Housholder was an employee of KFUO-AM. It appeared to Mr. Lauher that Mr. Housholder "was assuming certain responsibilities" with respect to the AM operation in light of the fact that the positions of Director of Broadcast Ministries and AM general manager were vacant at the time. (Tr. 162-63.)

[14] See NAACP Ex. 31, p. 4, for an example of an earlier application form which did contain the statement in question.

violating FCC policies but simply that if there was to be a combined EEO policy for the AM and FM stations, there appeared to be a contradiction with the requirement for religious training for a number of the positions. He noted that his reference to inadvertent noncompliance referred to the same issue. (Church Ex. 6, p. 2.)

104. Mr. Lauher sent copies of his March 9, 1989, memorandum to Ms. Cranberg, Mr. Stortz, Bob Thomson (the FM Sales Manager), Ron Klemm (the FM Program Director), Paula Zika (the Director of Business Affairs), and Jim Rice (unidentified in the record). (Church Ex. 7, Att. 5, p. 10; Church Ex. 3, p. 1; Tr. 185.)

105. On March 15, 1989, six days after his first memorandum, Mr. Lauher forwarded another memorandum to Reverend Devantier concerning the Stations' EEO compliance. (Church Ex. 4, Att. 11; Church Ex. 6, pp. 2-3.) Copies of the second memorandum were sent to Messrs. Stortz, Klemm, Thomson, and Rice, and Ms. Zika. (Church Ex. 4, Att. 11, p. 1.)

106. In his second memorandum, Mr. Lauher reviewed the list of "defensive measures" contained in the *EEO Handbook, A Practical Guide for Broadcasters*. Mr. Lauher stated:

> Out of the 130 measures listed, KFUO-FM has implemented or completed 79. Ten of the measures appear to be "Not Applicable" to our situation. The remaining 41 measures are currently being reviewed to see whether the action has been taken, needs to be taken or is not applicable to our situation.

(Church Ex. 4, Att. 11, p. 1; Church Ex. 6, pp. 2-3.) Among the items Mr. Lauher check marked as "implemented or completed" by KFUO-FM were: (a) taking "EEOC" matters seriously; (b) evaluating all employment practices, and eliminating those that have an adverse impact on minorities; and (c) conducting "a continuing campaign to exclude every form of prejudice or discrimination based upon race, color, religion, national origin, or sex from the station's personnel policies and practices and working conditions." (Church Ex. 4, Att. 11, pp. 2, 4; Tr. 166-67.)

107. Among the items which Mr. Lauher did not check mark were:

> Establish an EEO officer to implement your station's EEO program and to keep current on developments in the law. (Church Ex. 4, Att. 11, p. 2.)
>
> Include a copy of your EEO program in personnel manuals and employee handbooks. (*Id.* at Att. 11, p. 3.)
>
> Communicate your station's EEO policy and program and your employment needs to sources of qualified applicants without regard to race, color, religion, national origin or sex, and solicit their recruitment assistance on a continuing basis. (*Id.*)
>
> Maintain a list of the recruitment sources you will use in seeking qualified female and minority applicants. (*Id.*)
>
> Maintain written records of all the referrals made by your recruitment sources, and inform recruitment sources, in writing, of the disposition of applicants they have referred. (*Id.* at Att. 11, p. 4.)
>
> Conduct a continuing review of your job structure and employment practices, and adopt positive recruitment, training, job design, and other measures to ensure genuine equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility throughout the station. (*Id.*)
>
> Where appropriate, post notices of vacancies in the station, and afford current employees the opportunity to apply for promotion. (*Id.* at Att. 11, p. 7.)
>
> Contact minority organizations, organizations for women, media, educational institutions, and other potential sources of female and minority applicants, for referrals. (*Id.*)
>
> Interview all applicants who appear to be qualified. If you decide that an applicant has insufficient qualifications to be interviewed, document and inform the applicant, in writing, of your reasons. (*Id.*)[15]

108. Mr. Lauher testified that he did not check mark "Establish an EEO officer . . ." because no decision had yet been made as to a replacement for Reverend Abatie. (Tr. 167.) He did not check mark "Maintain a list of the recruitment sources . . ." because the station had not yet evaluated its current sources. (Tr. 168-69.) In this regard, Mr. Lauher believed that the Station maintained such a list, but he had never actually seen it. (Tr. 168-69.) Mr. Lauher did not check mark "Conduct a continuing review . . ." because he did not recall such a formal review at the station. (Tr. 171.) He did not check mark "Contact minority organizations . . ." because he had not yet ascertained whether the station was doing that. (Tr. 178-79.) In this connection, the fact that there was no check mark next to an item did not mean that a step had not been taken, but that personnel were still "double-checking" whether the station was in compliance. (Church Ex. 4, Att. 11, p. 1; Tr. 178-79.)

109. Between March 15, 1989, the date of the second memorandum, and February 1, 1990, the end of the License Term, the Stations hired 13 full-time and 7 part-time employees. (Church Ex. 4, Att. 6, pp. 6-8, 14-15.) Of the 13 full-time hires, 9 were hired without the use of either minority or nonminority secular recruitment sources. However, such sources were contacted in connection with the hiring of 4 employees (Sharisse Bush, Cynthia Blades, Bridget Williams, and Timothy Meeks). Of these four, three were African American (Ms. Blades, Ms. Williams, and Mr. Meeks). Of these three, two were hired after the NAACP filed its Petition to Deny (Ms. Williams and Mr. Meeks). (*Id.* at Att. 6, pp. 7-8.) Similarly, of the seven

[15] Reverend Devantier testified that unsuccessful applicants who were interviewed were notified by letter that they had not been selected. Some of these letters were signed by Reverend Devantier. He could not recall any letter signed by him in which the reasons for non-selection were given. (Tr. 813.)

part-time hires, six were hired without the use of either minority or nonminority secular recruitment sources, and none of the seven was a minority. (*Id.* at Att. 6, pp. 14-15.)

110. Subsequent to receiving these memorandums, Reverend Devantier and Mr. Lauher engaged in discussions in which a question was raised about whether some of the items on the checklist pertained to religious stations. Reverend Devantier advised Mr. Lauher to do whatever was needed to assure "continuing [EEO] compliance." (Church Ex. 7, p. 10; Church Ex. 6, p. 3; Tr. 180, 855.)

111. As a result of Mr. Lauher's memorandums and their conversations, Reverend Devantier, at a meeting on April 5, 1989, notified the Standing Committee of the Church's Board for Communications Services of the "importance of adhering to laws and regulations pertaining to the Federal Equal Employment Opportunity programs." (Church Ex. 7, p. 10 and Att. 7, p. 2; Tr. 858-59.) The portion of the Minutes of the Standing Committee which related to EEO stated:

> In the matter of Radio Station Licensing, Rev. Devantier pointed out the importance of adhering to laws and regulations pertaining to the Federal Equal Employment Opportunity programs. Following discussion it was resolved that:
>
> > KFUO-AM & FM operate under a single EEO program and that positions [sic] descriptions be reviewed and revised as necessary to assure that the special background and experience for entry level into the individual position be specified.

(Church Ex. 7, Att. 7, p. 2.) According to Reverend Devantier, the Standing Committee took this action because it believed that since KFUO(AM) and KFUO-FM had similar purposes, and were both affiliated with the Church, a single EEO policy would suffice. (*Id.*; Tr. 856-57.)

112. Shortly after his meeting with Reverend Devantier, Mr. Lauher requested information from Ms. Cranberg concerning the relationship between KFUO's religious affiliation and the EEO requirements. (Church Ex. 8, p. 5.) Arnold & Porter had not addressed this issue in any of its client advisories during the License Term. (Church Ex. 4, p. 13; Church Ex. 8, p. 5.)

113. By letter of April 4, 1989, Ms. Cranberg advised Mr. Lauher that in the *King's Garden* case,[16] the Court of Appeals determined that it was permissible for the Stations to use a religious criterion for "certain limited employment categories" consisting of persons "whose work [was] connected with the espousal of the licensee's religious views." Ms. Cranberg continued:

> Generally, . . . the court held[] that in delineating the appropriate employment categories, the Commission should "fix upon the nexus between the employment position in question and the religious content of the programs aired by the sectarian licensee". [sic] Specifically, said the court, "[w]here a job position has no substantial connection with program content, or where the connection is with a program having no religious dimension", [sic] discrimination will not be permitted.

(Church Ex. 8, Att. 6.)

114. As examples of positions where the Commission found a religious employment requirement permissible, Ms. Cranberg gave writers and research assistants hired for the preparation of programs espousing the licensee's religious views, and those hired to answer religious questions on a call-in program. She stated, however, that:

> The Commission concluded . . . that announcers, as a general category, would not be exempt from the nondiscrimination rules, because there is no reason why an announcer must be of a particular faith in order to introduce a program or insert news, commercial announcements, or station identifications during or adjacent to any program.

(Church Ex. 8, Att. 6.)

115. Ms. Cranberg further stated that, although *King's Garden* dated from the mid-1970s, she had been assured by FCC staff that its "general guidelines" were still in force. Ms. Cranberg concluded her letter as follows:

> In sum, while a religious affiliation requirement may be permissible in certain circumstances, it is clear that the FCC and the courts are likely to restrict such limitations to very narrow situations where the employee is directly connected with the production of programming which espouses a religious viewpoint. Given the undeveloped nature of the FCC's requirements in this area and the fact that the FCC enforces its employment requirements fairly rigorously, if, during the process of revising employment guidelines for its broadcast stations, the Lutheran Church/Missouri Synod so desires, we shall be happy to confer with you further in an effort to develop guidelines acceptable to the FCC.

(Church Ex. 8, Att. 6.)

116. On April 26, 1989, following the letter from Ms. Cranberg, Mr. Lauher circulated a packet of updated materials to be used in the hiring process. Mr. Lauher was concerned that the FM station should be sure that it had made very clear to recruitment sources that it was actively seeking minority and female applicants. (Church Ex. 6, p. 3.) The materials included a revised employment application form. The form began with the following language:

> Discrimination because of a person's race, color, creed, religion, sex, national origin, or age in employment and personnel practices is prohibited by the Federal Communications Commission. If you be-

[16] *In re Complaint by Anderson*, 34 FCC 2d 937 (1972), *aff'd sub nom. King's Garden, Inc.*, 38 FCC 2d 339 (1972), *aff'd sub nom. King's Garden, Inc. v. FCC*, 498 F.2d 51 (D.C. Cir. 1974), *cert. denied* 419 U.S. 996 (1974).

> lieve your equal employment rights have been violated, you may contact the appropriate local, state or federal agency.

The form also deleted the question asking for religious affiliation, and deleted the statement about the preference for members of the LCMS. (Church Ex. 4, p. 14 and Att. 13, pp. 8-11; Tr. 184-85.) The package also contained, *inter alia*, a KFUO-FM EEO Policy Statement, a Notice to Employees and Applicants for Employment Regarding Station EEO Policy and Program, an EEO Data Form, and an Applicant Flow Chart. (Church Ex. 4, p. 14 and Att. 13.) The Notice stated that the policy of KFUO-FM was to provide equal employment opportunity to all qualified individuals without regard to race, color, religion, national origin or age. It also requested that, if current employees knew of qualified women and minorities who might be interested in working at the station, they refer them to the station. (*Id.* at Att. 13, p. 16.)

117. On May 9, 1989, Arnold & Porter sent a letter to Mr. Stortz in which it was stated:

> It was brought out [at a recent NAB Convention] that under today's FCC policies, the contacts with minority and female referral sources must be genuine and substantial; referral sources should be regularly checked and the licensee should keep good records of its contacts with such sources in order to demonstrate to the FCC, if challenged, that it has used its "best efforts."

(MMB Ex. 22.)

118. On June 21, 1989, Arnold & Porter wrote to Mr. Stortz reporting that there had been an increasing number of cases in which sanctions for EEO violations were issued "even in situations where no petitions to deny had been filed." The letter advised that

> licensees should utilize both female and minority recruitment sources for each job opening at the station. . . . Moreover, if the recruitment sources used by the station fail to turn up minority or female applicants, the licensee must make efforts to determine why this is so, and attempt to develop more effective minority and female recruitment alternatives. The licensee's contacts with minority and female recruiters must be meaningful and genuine.

(NAACP Ex. 47.)

119. In July 1989, Mr. Lauher took sample letters from an "NAB guidelines reference book" and edited them to suit the Stations' circumstances. (Church Ex. 4, p. 14; Tr. 188-89.) As edited, the letters read:

> Station KFUO-FM is an Equal Opportunity Employer. From time to time, we have job openings at our station which require a variety of skills and talents.
>
> We encourage members of minority groups and women to apply for these positions, and we seek your help in referring minorities and women to us.
>
> We will be contacting you as job openings arise at our station. In the meantime, if you know of minority group members and/or women who might be interested in working at our station, please do not hesitate to refer them directly to me [Mr. Lauher]. In the event you do not presently know of any such candidates, please refer them to me whenever they come to your attention.
>
> If you are aware of any other organization which may be of assistance to us in this regard, I would also appreciate having its name and address. I am enclosing a reply form, and ask that you complete and return it to me to acknowledge receipt of this letter.
>
> Thank you for your assistance.

The "reply forms" stated: "This is to acknowledge that I [the addressee] have received a letter from Station KFUO-FM seeking female and minority referrals for job openings at the station." Spaces for a signature and the date, among other things, were provided. (Church Ex. 4, pp. 14-15 and Att. 14; MMB Ex. 2, pp. 1-2, 8-9.)

120. The letters were signed by Mr. Lauher and sent by the FM station to at least 10 local universities and personnel agencies including: Roth Young Personnel Service of St. Louis, University of Missouri at St. Louis, Meramec Community College, The Broadcast Center, Southern Illinois University at Edwardsville, Lindenwood College, John N. Olin School of Business at Washington University, St. Louis Community College, Snelling & Snelling of Clayton, and Sales Recruiters Irvin-Edwards. (Church Ex. 4, p. 14 and Att. 14.)[17] Mr. Lauher selected these organizations because he believed they would send him applicants with minimal experience, and those were the kind of employees the station usually hired. (Tr. 189-90.)

121. Mr. Lauher testified that the letters were sent because the lawyer conducting the EEO seminar at the fall Missouri Broadcasters Association meeting

> led me to feel regardless of what had been done at any prior time that it was best to err on the side of making sure, and that's all I felt that we were doing there was just making sure . . . that we had in writing to these various agencies . . . what the letter states.

(Tr. 123, 189.) None of the letters resulted in any referrals of minority applicants. (MMB Ex. 2, p. 2; MMB Ex. 6, pp. 5-6.)

122. Between the time these letters were sent and the end of the License Term, the Stations filled nine full-time positions and five part-time positions. (Church Ex. 4, Att. 6, pp. 6-8, 14-15.) None of the local universities and personnel agencies enumerated above was contacted in connection with any of these job openings. (*Id.*)

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[17] Mr. Lauher believed that Meramec College had a high enrollment of minorities. (Tr. 189-90.) In the KRJY Opposition, Mr. Miller stated that Meramec Community College was a relatively "fertile" source of minority referrals. (Church Ex. 12, p. 8.)

123. According to Mr. Stortz, the EEO forms developed by Mr. Lauher were not used during the remainder of 1989 because of turnover in managerial personnel which took place in the summer of that year. (Church Ex. 4, p. 15; Tr. 616-18.) Indeed, Mr. Lauher himself left KFUO-FM in July 1989. His departure had nothing to do with his efforts concerning EEO, but related to the station's failure to meet sales expectations. (Church Ex. 6, p. 3; Tr. 867-68.)

124. After Mr. Lauher left, Reverend Devantier became acting general manager of the FM station and Mr. Stortz remained as Operations Manager of that station. (Tr. 616.) EEO compliance became the responsibility of both Reverend Devantier and Mr. Stortz, but there was no discussion of how that responsibility was to be apportioned. (Tr. 616, 618, 815-16.) According to Reverend Devantier, the routine day-to-day responsibility for the operation of the station was assigned to Mr. Stortz, and that responsibility included, for example, sending out notices of job openings and notifying job sources of the station's EEO policies. (Tr. 816.) Reverend Devantier "did not become heavily involved in the day-to-day functioning and detail of the operation" of the FM station. (*Id.*)

125. In a memorandum drafted after receiving the NAACP's January 2, 1990, Petition to Deny (MMB Ex. 3; Tr. 660), Mr. Stortz stated that the two new managers of KFUO(AM) and KFUO-FM in October 1989 had no way of knowing about any previous problems of noncompliance with Stations' EEO program other than by studying the records, and they learned of the problems by way of the Petition to Deny (NAACP Ex. 48, p. 1).

126. The Stations further augmented their efforts to comply with EEO requirements in 1989. (Church Ex. 4, p. 15; NAACP Exs. 46, 47; MMB Exs. 22, 23.) For example, the Stations began seeking referrals from the Lutheran Employment Project of St. Louis, a clearinghouse run by various Lutheran churches for employment of members of minority groups. In late 1989, KFUO interviewed three minority persons referred by the Lutheran Employment Project, and hired one of them, Ms. Cynthia Blades, an African American, on November 1, 1989. (Church Ex. 4, p. 15 and Att. 6, p. 7; Tr. 754.) The Stations also continued to utilize employee referrals and resumes on file to fill some openings during 1989. (Church Ex. 4, Att. 6, pp. 6-7.)

127. On November 21, 1989, Arnold & Porter sent a letter to Mr. Stortz containing a "quick review" of two recent Commission decisions wherein forfeitures and conditional renewals were imposed on licensees for EEO violations. The law firm again advised "that in filling job openings, stations *must* regularly utilize recruitment sources which are likely to refer qualified minority applicants." (MMB Ex. 23, emphasis in original.)

128. As discussed earlier, Mr. Stortz believed that all of Arnold & Porter's letters were form letters sent to all of their clients. Nothing in them alerted him to any particular EEO deficiency of the Stations, or dealt with the subject of religious qualifications for particular jobs. (Church Ex. 4, p. 13; Tr. 549-50.) Mr. Stortz read the letters and passed them on to the station managers. (Tr. 610-11.) During the License Term, Mr. Stortz never initiated any communication with Arnold & Porter with respect to the Stations' EEO program. (Tr. 767-68.) Mr. Stortz and Ms. Cranberg had never met in person until the depositions in this proceeding were taken. (Church Ex. 8, pp. 4-5.)

129. In the second half of January 1990, Mr. Stortz used EEO Data Forms and EEO Recruitment Program Forms in connection with new hires. (Church Ex. 4, p. 15 and Att. 15.) Moreover, at that time, the Stations continued to contact the Lutheran Employment Project and also contacted an Outreach Ministry for minority employment in northern St. Louis. (Church Ex. 11, p. 1; Tr. 539-40.) The Outreach Ministry referred prospective candidates, but none chose to fill out applications. (Church Ex. 11, p. 1.)

130. In January 1990, the Stations also advertised in newspapers, such as the *St. Louis American* and the *St. Louis Sentinel*, whose target audiences were African American, for the then-existing job vacancies. (Church Ex. 4, p. 15 and Att. 9, pp. 9-12; Tr. 538-39.) An African American male, Timothy Meeks, was hired through the *St. Louis American* for a "Maintenance" position serving both Stations, and an African American female, Bridget Williams, was hired through the *St. Louis Post Dispatch* for a "Secretary/Receptionist" position at the AM station. (Church Ex. 4, Att. 6, p. 8.) By that time, the Stations had received the NAACP's Petition to Deny and had begun to recruit more vigorously. (Tr. 534-44.)

131. In making the hires in January 1990, the Stations used a rating form developed by Angela Burger, the Stations' Assistant Director of Development, who performed the job interviews for these positions. Ms. Burger brought the format of the form with her from a prior job and had not done job interviews for the Stations before January 1990. (Tr. 520-22, 726-27.) The rating form for the Secretary/Receptionist position scored applicants on scales of 1 to 10 on such factors as "punctual," "good appearance," "good guest greeter," and "works well with people." (*E.g.*, NAACP Ex. 63, p. 1.) The applicants for the Maintenance position were similarly scored on such factors as "clean," "ledgible [sic] writing," and "follows orders." (*Id.* at p. 3.) Three of the four Secretary/Receptionist applicants and five of the six Maintenance applicants were African American. (Church Ex. 4, Att. 6, p. 8.) Mr. Stortz testified that the factors considered in evaluating these candidates had been used before, but he could not recall other instances in which candidates had been scored numerically on a rating form. (Tr. 727-30, 789-90.)

132. During the approximately 10-month period after the Stations reviewed their EEO policies, *i.e.*, from March 1989 to January 1990, the Stations hired 13 full-time employees of whom 3 (22%) were African American. (Church Ex. 4, Att. 6, pp. 6-8.) Two of the three minorities, however, were hired after the NAACP filed its Petition to Deny the renewal applications of the Stations. (*Id.* at Att. 6, p. 8; MMB Ex. 3.) The Stations sought referrals, including Lutheran publications and employee referrals, for at least 9 of the 13 full-time hires. (Church Ex. 4, Att. 6, pp. 6-8.)

133. During the last two-and-one-half-year period of the License Term after the FCC revised its EEO rules, *i.e.*, from August 3, 1987, to January 31, 1990, the Stations hired 24 full-time employees, of whom 4 (16%) were minority. (Church Ex. 4, Att. 6, pp. 4-8.) As noted above, however, two of the four minorities were hired after the NAACP filed its Petition to Deny. (*Id.* at Att. 6, p. 8; MMB Ex. 3.) The Stations sought referrals, including Lutheran publications and employee referrals, for at least 14 of these 24 hires. (Church Ex. 4, Att. 6, pp. 4-8.) As of the pay period ending January 31, 1990, the Stations' overall minority employment was at 71.2% of parity, but there were no minority employees in Top Four category jobs. (Church Ex. 4, Att. 12, p. 4.)

134. In the Stations' 1989 renewal applications, Mr. Stortz added a sentence to the section on "Recruitment" in the EEO Program stating that the Stations "actively seek female and minority referrals." Mr. Stortz also attached a sample of a part of one of the Stations' July 1989 recruitment letters. According to Mr. Stortz, this was done because the Stations had "generally" publicized openings for much of the License Term and had sent recruitment letters in July 1989 to at least 10 local universities and personnel agencies stating that KFUO-FM encouraged minority applications and was seeking help in recruiting minorities. Mr. Stortz believed that the letters were evidence of the Station's then-current, *i.e.*, July to September 1989, active efforts to recruit minorities and females. KFUO-FM had in fact sent the letters and Mr. Stortz testified that he had no intention of misleading the Commission by attaching the sample. (Church Ex. 4, pp. 17-18.)

135. In the Stations' 1989 renewal applications, Reverend Devantier was identified as the person responsible for implementation of the Stations' EEO program. (Church Ex. 4, Att. 16, p. 6.) He was so identified because as of the date of the application, September 29, 1989, he was the Stations' CEO, the newly-hired general manager of KFUO(AM) had not yet started working, and no permanent general manager of KFUO-FM had been hired. (Church Ex. 4, pp. 16-17; Church Ex. 7, pp. 10-11; Tr. 860-61.) In his testimony, Reverend Devantier expressed regret that the Stations had not done more to pursue sources specializing in the referral of minorities. (Church Ex. 7, p. 11.)

D. The "Requirement" for Knowledge of Classical Music

136. During the License Term, the Stations believed that it was essential or highly desirable for announcers and salespersons for the FM station to be knowledgeable about classical music. However, toward the end of the License Term, the thinking of station management evolved and they began to believe that general experience in sales was perhaps as or more important than knowledge of classical music as a qualification for salespersons at KFUO-FM. (Church Ex. 4, p. 9; Tr. 873-74.)

137. According to the Church, the FM station's views about salespersons' knowledge of classical music is best understood by reviewing the history of the station's sales efforts. Between 1983 and 1986, KFUO-FM did not hire its own salespersons but instead relied on an outside consultant, Concert Music Broadcast Sales ("CMBS"), to sell both national and local advertising time on the station. CMBS was an advertising representative firm devoted exclusively to sales of the classical radio format. In addition to its headquarters in New York City, CMBS had sales offices in Chicago, Dallas, Los Angeles, Atlanta, Detroit, and San Francisco. (Church Ex. 4, p. 9; Church Ex. 5, p. 2.)

138. In the early 1980s the founder of CMBS, Peter J. Cleary, had discovered that KFUO-FM was operating on a commercial frequency. CMBS had wanted a full-time classical music radio outlet in the St. Louis market, so Mr. Cleary contacted the Church to urge it to change KFUO-FM from a noncommercial operation. According to Mr. Cleary, it took him about three years of "arm twisting" before the Church began to sell time on KFUO-FM in July 1983. (Church Ex. 5, p. 1; Tr. 209.)

139. When the Church decided that KFUO-FM would sell advertising in 1983, there was no sales staff either on KFUO-FM or KFUO(AM). In fact, the Church had no previous experience in radio sales. Accordingly, CMBS agreed itself to become KFUO-FM's initial sales force, both nationally and locally. CMBS opened a St. Louis office and hired Tom Jackson, who was experienced in radio and television sales and had an interest in and an understanding of classical music. (Church Ex. 5, p. 4; Tr. 509.) Mr. Jackson was an employee of CMBS. (Tr. 212.)

140. In 1986, KFUO-FM took over its own sales efforts and looked to CMBS and Mr. Cleary for guidance. Mr. Cleary believed that because KFUO-FM was a previously noncommercial station with little audience and no advertiser brand-name recognition, the Station's "formatic [sic] image" had to be developed and conveyed to the universe of advertisers. Also, because of its modest billing levels, KFUO-FM was not able to attract truly experienced radio salespeople. This meant that there was very little depth within KFUO-FM's selling ranks for on-the-job training. Hence, CMBS advised Reverend Devantier and station management that KFUO-FM should look for salespeople who were comfortable with classical music, people who could talk credibly about the music. (Church Ex. 5, p. 6; Tr. 216-17, 219-21, 873.)

141. Reverend Devantier also believed that knowledge of classical music would be a desirable trait in the station's salespeople, although he conceded that "a working knowledge" of that music could be learned on-the-job over a period of time. (Tr. 817-18, 873.) This was in accord with Mr. Cleary's opinion that KFUO-FM needed people in sales who had knowledge of classical music because the station "had to establish a new identity and then market it." (Church Ex. 5, p. 5.) According to Mr. Cleary, the station needed salespeople who were comfortable with classical music and could effectively project the essence of KFUO-FM's format to potential advertisers. (*Id.*)

142. When it came time to hire KFUO-FM's own initial sales manager, Mr. Stortz proceeded on the same premise, that is, that people with knowledge of classical music would be the best salespersons because they would know their "product." (Church Ex. 4, p. 10.) Mr. Stortz defined the "product" as a combination of the format of KFUO-FM and the demographics of the audience. (Tr. 510-11; *see also* Tr. 216, 230-31, NAACP Exs. 8, 12.) The station hired Bern Hentze, who had classical music knowledge and experience. (Tr. 647-48.)

143. Mr. Stortz testified that at times during the years 1986 to 1989, the turnover in KFUO-FM's sales force was great and economic pressures forced the station to hire replacements quickly. (Church Ex. 4, p. 10.) Mr. Lauher confirmed in his testimony that it was "a struggle" to find anyone to work in a sales position from May 1987 to July 1989 because the salary structure was low and KFUO-FM was just initiating a sales effort. KFUO-FM was not doing well financially and had difficulty competing for job applicants with the more profitable St. Louis commercial stations. (Church Ex. 6, p. 1.) Thus, there were instances in which the station had "to settle" for people who had less knowledge about the "product" than it might ideally have liked and, in some cases, persons with no such knowledge were hired. (Church Ex. 4, p. 10; Tr. 874.) Nevertheless, classical music knowledge was considered a desirable trait for an applicant for a sales position at KFUO-FM and, provided everything else was equal, the station would select an individual with that knowledge, experience, or background. (Tr. 818.)

144. Towards the end of the License Term, at least some members of the KFUO-FM staff began to believe that general experience in sales was an equal or more important criterion. (Church Ex. 4, p. 9; Tr. 873-74.) Mr. Cleary

acknowledged that among sales/marketing circles, there developed in the late 1980s and into the 1990s the viewpoint that good, experienced salespeople could sell anything and that a comfortable knowledge of the "product" could be learned on-the-job. (Church Ex. 5, pp. 5-6.)[18]

145. During the License Term, KFUO-FM hired 15 individuals for the position of Sales Worker. (Church Ex. 4, Att. 6, pp. 3-7.) Giving the Church the benefit of all possible doubts, 8 of the 15 had some classical music background, or experience working at a classical music station, or listened to KFUO-FM at the time they were hired. These were: Charlotte Akin (NAACP Ex. 32, p. 4), Wynn Bressler (Tr. 646), Sharisse Bush (Tr. 646-47), Bern Hentze (Tr. 647-48), Jan Hutchinson,[19] Caridad Perez (Tr. 649-50), Glynelle Wells (NAACP Ex. 32, p. 25; Tr. 650), and Frank Wood (MMB Ex. 14, pp. 71-72). The record does not reflect that any of the remaining seven Sales Workers had such a background at the time they were hired. These were: James Bebo (Tr. 201), Beverly Brandt (Tr. 646), Tom Koon (Tr. 200, 649), Judy McMurty (Tr. 649), Carolyn Miller (Tr. 649), Bob Thomson (Tr. 650), and Lucy Walker (Tr. 201).

146. The recruitment or referral source for 11 of the 15 Sales Workers who were hired by the station was "Resume on File" (Ms. Akin, Ms. Brandt, Mr. Bressler, Ms. Bush, Mr. Koon, Ms. McMurty, Ms. Miller, Ms. Perez, Mr. Thomson, Ms. Walker, and Mr. Wood). Other recruitment or referral sources utilized for these positions were *Broadcasting* magazine (Mr. Hentze's position), a posting at Church headquarters (Mr. Hentze's position), the St. Louis Broadcast Center (Mr. Bebo and Ms. Bush's positions), and referrals from station employees (Ms. Miller, Ms. Walker and Ms. Wells' positions). One employee transferred from CMBS's payroll to the station's (Ms. Hutchinson). (Church Ex. 4, Att. 6, pp. 3-7.)

147. The record in this proceeding contained two job descriptions for the position of Account Representative (NAACP Ex. 40, pp. 10-11; NAACP Ex. 41, pp. 11-12), and two job descriptions for Sales Managers positions (NAACP Ex. 40, pp. 17-18; NAACP Ex. 41, pp. 14-15).[20] One of the Account Representative job descriptions (dated June 1987) and one of the Sales Manager job descriptions (also dated June 1987) included no mention of classical music knowledge, expertise, appreciation, or experience as an "Essential" or "Other Desirable" position qualification. (NAACP Ex. 40, pp. 10-11, 17-18.) The second Account Representative job description (dated June 1989) listed as "Other Desirable" position qualifications: "Knowledge of and appreciation for classical music," and "Experience with a classical music radio station." (NAACP Ex. 41, pp. 11-12.) Similarly, the second Sales Manager job description (also dated June 1989) listed as an "Other Desirable" position qualification: "Knowledge of the classical music format." (*Id.* at pp. 14-15.)

148. In addition, two of the Chief Engineer job descriptions (dated October 1986 and June 1987) listed as an "Other Desirable" position qualification: "Knowledge of and appreciation for classical music." However, neither of these job descriptions referred to the Chief Engineer performing any functions or having any responsibilities relating to the format of, or the type of music or programming broadcast by, the FM station. (NAACP Ex. 39, pp. 9-11; NAACP Ex. 40, pp. 14-16.) In this connection, in its February 23, 1990, Opposition to the NAACP's Petition to Deny, the Church stated that the Chief Engineer's position did not require classical music training. (Church Ex. 4, Att. 7, p. 13 n.3.)

149. According to Mr. Stortz, the need for classical music knowledge for various positions, including salespersons, did not in any way affect the Stations' willingness to recruit individuals of any race. The Stations had no sense that the requirement for familiarity with classical music would single out minorities for negative effect or would disqualify members of any race. Moreover, to the best of Mr. Stortz's knowledge, no minority applicant was ever rejected for any position at KFUO-FM because he or she lacked knowledge of classical music. (Church Ex. 4, pp. 10, 16; Tr. 511-12.) Further, in a January 23, 1990, memorandum to Ms. Cranberg, Mr. Stortz, in response to the NAACP's Petition to Deny, indicated that the Stations planned to hire an additional minority during 1990, and stated:

> As KFUO & KFUO FM searches for qualified people to fill its employment needs, there will be no racial barriers to block any applicants. However, applicants must qualify for positions requiring theological or classical music backgrounds. We will certainly seek any minorities having that background. It is the firm resolve of both stations to be in compliance with the EEO program submitted.

(NAACP Ex. 49, p. 3.)

150. On September 29, 1989, the Stations filed with the Commission their applications for renewal of license. (Church Ex. 4, Att. 16, p. 1.) Included in that application was the Stations' Broadcast Equal Employment Opportunity Program. (*Id.* at Att. 16, pp. 4-8.) The Program was prepared in draft form by Paula Zika, the Stations' Director of Business Affairs, and was reviewed by Mr. Stortz, the general manager. (Church Ex. 3, pp. 1-2; Church Ex. 4, p. 16.) A sentence in the Stations' EEO Program relating to

[18] The view that an experienced salesperson could sell an audience to an advertiser was shared by the NAACP's witnesses, Richard J. Miller and Jan Hutchinson. (NAACP Exs. 7, 8, 12.) Mr. Miller conceded, however, that some "rudimentary familiarity" with the music would be helpful, but stated that it could be learned easily and quickly on-the-job or by taking "a course on classical music appreciation at a junior college." (NAACP Ex. 12, p. 1.) Ms. Hutchinson, too, acknowledged that it might be important for a classical music salesperson to know the difference between a symphony and an opera, but was of the opinion that any good radio salesperson could learn everything he or she would need to know about classical music in order to service an advertiser's needs "in a couple of hours or less." (NAACP Ex. 8, p. 3.)

[19] Jan Hutchinson began selling commercial time for KFUO-FM in 1984. (NAACP Ex. 7, p. 1.) She was originally an employee of CMBS. (Church Ex. 5, p. 5; Tr. 222-23, 225, 648-49.) On September 29, 1986, KFUO-FM hired Ms. Hutchinson for a Sales Worker position at the station. (Church Ex. 4, Att. 6, p. 3; Tr. 225-26.) At the time she began working for CMBS in 1984, Ms. Hutchinson had no classical music knowledge. (NAACP Ex. 7, p. 1.) However, she was familiar with the format of KFUO-FM at the time she was hired by the station. (Tr. 648-49.)

[20] With respect to job descriptions generally, *see* note 3, *supra*.

"Recruitment" stated: "When vacancies occur, it is the policy of KFUO and KFUO-FM to seek out qualified minority and female applicants." (Church Ex. 4, Att. 16, p. 7.) Mr. Stortz believed that this sentence needed no change, and was accurate, "because at that time the Stations generally sought qualified minorities and females for openings on their staff." (*Id.* at p. 17.) Mr. Stortz admitted, however, that this was actually done "toward the end of the license period." (Tr. 774-75.) Although Mr. Stortz was aware that the Stations had certain job qualifications, such as theological or classical music training, he did not believe that this made the sentence in question misleading. Mr. Stortz explained that the sentence stated that the Stations sought "qualified" minority and female applicants, and he viewed this as consistent with the Stations' use of various employment criteria such as religious training or knowledge of classical music. Moreover, since the Commission had not questioned the Stations' 1982 or any prior renewal, Mr. Stortz testified that he had no reason to believe the Stations needed to enumerate the various job qualifications that the Stations used, as opposed to just stating that the Stations sought "qualified" applicants. (Church Ex. 4, p. 18.)

151. As noted earlier, on February 23, 1990, the Church filed an Opposition to the NAACP's Petition to Deny. (Church Ex. 4, Att. 7, p. 2.) The Opposition was prepared by Ms. Cranberg. (Church Ex. 8, p. 6.) Mr. Stortz reviewed the Opposition and provided an affidavit concerning the truth of the facts asserted therein, but did not formulate or draft the legal arguments. (Church Ex. 4, Att. 7, p. 53.)

152. The Opposition stated:

> Given the specialized nature of KFUO's formats, nearly all of the positions within KFUO's top four job categories can only be filled by persons who have either expertise in classical music (for KFUO-FM) or theological training in the doctrine of the Lutheran church (for KFUO-AM).
>
> * * *
>
> Clearly nearly all of KFUO's employees must have specialized skills. However, relatively few minorities in the St. Louis area possess these skills.

(Church Ex. 4, Att. 7, pp. 13-14.)

153. Ms. Cranberg testified that, in drafting this portion of the Opposition, she used this language on the basis of a number of conversations and written communications from Mr. Stortz. Ms. Cranberg had asked Mr. Stortz whether there were any particular positions at the Stations that required certain specialized skills or background. Mr. Stortz had stated that there were such requirements, and the two discussed them and the reasons why specialized skills were necessary. (Tr. 990-91, 1020-22, 1033.) Mr. Stortz had also faxed Ms. Cranberg a two-page memorandum in which he wrote: "KFUO-FM's format is 'Classical,' with many of it's [sic] positions requiring a knowledge of classical music and foreign language, with a hope that the sales people can relate and talk knowledgeably about the format. These are not easy positions to fill." (NAACP Ex. 49, p. 3.)

154. The Opposition also contained an argument that because of KFUO-FM's classical music format, and the resulting need for certain employees to be knowledgeable about that format, the Commission should consider using alternative data to the general labor force statistics in judging the results of certain of the Station's recruitment efforts. (Church Ex. 4, Att. 7, pp. 14-16.) In this regard, the Opposition stated:

> . . . KFUO is not aware of any specific statistics showing classical music training among members of minority groups. However, one measure is the popularity of KFUO-FM (the only full-time classical music station in the area) among persons who are members of minority groups. In October and November 1988 (the most recent figures available to KFUO), only 3.7 per cent of KFUO-FM's 72,800 listeners -- or 2,693 -- were black; 0 per cent were Hispanic or Asian. This is approximately .1 per cent of the population of the St. Louis Metropolitan Statistical Area. Figures as to persons *in the labor market* with classical music *expertise* -- as opposed to simply interest -- would, of course, be even lower.
>
> Thus, KFUO's highly specialized employment needs make reliance upon overall minority labor force availability meaningless. In fact, there is but a small number of minority persons in the St. Louis SMSA -- or, for that matter, nationwide -- who possess the qualifications KFUO requires for nearly every job position at the station. By one estimate, only about .1 per cent of the St. Louis population consists of members of minority groups with classical music training; roughly two per cent of the population consists of members of minority groups with Lutheran theological training. KFUO's minority employment record must be considered in that context.

(*Id.* at pp. 15-16, emphasis in original, footnote omitted.) Similar arguments were made by the Church in a Motion to Strike and Reply to Comments, filed on September 21, 1992 (MMB Ex. 11, pp. 10-11, 16-18), and in a Reply to FCC Letter of Inquiry, filed December 28, 1992 (MMB Ex. 14, pp. 31-32).

155. In the Church's view, the argument did not describe KFUO-FM's hiring practices, and said nothing about KFUO-FM's willingness to recruit for and hire minority individuals. (Church Ex. 4, Att 7, pp. 10-11 n.2.) Rather, as Ms. Cranberg testified, although the argument was discussed with Mr. Stortz, it was Arnold & Porter's idea to use the argument in the Opposition. (Tr. 991-92, 1022-23.) Ms. Cranberg further testified that the statistics regarding the station's minority listeners were presented solely in a preliminary effort to argue that statistics should take into account the relevant pool of qualified individuals for particular specialized employment positions in order to have any meaning. (Church Ex. 8, pp. 6-7.) Ms. Cranberg described her intent as follows:

> The arguments were part of an overall discussion of a number of factors that I felt the Commission should take into account in assessing the stations' employment profile, including the small number of employees overall at the stations, the fact that the stations had a greater number of minority employees over the license period than were reflected in the annual employment reports, and the fact that a significant number of positions required very specialized skills such that relying on overall labor forces -- didn't seem to

> be a very precise way of measuring the stations' performance. That was my purpose in, in making the argument.

(Tr. 992.)

156. Ms. Cranberg was of the view that the Opposition did not state, and did not intend to imply, that KFUO-FM had not or would not continue to engage in affirmative action recruitment efforts because of these statistics. Arnold & Porter also did not mean to imply that the station viewed such recruitment efforts as pointless. Indeed, Arnold & Porter had no reason to believe, based on its dealings with personnel at the Stations, that either of these supposed implications of its statements were true. (Church Ex. 8, p. 7.)

157. In Ms. Cranberg's view, this was a method of analysis the FCC had specifically endorsed in *Equal Employment Opportunity Processing Guideline Modifications for Broadcast Renewal Applicants*, 79 FCC 2d 922, 47 RR 2d 1689 (1980). It was also a method of analysis which Arnold & Porter had previously employed before the Commission on behalf of another broadcast client, classical music station WFLN in Philadelphia. (Church Ex. 8, p. 7; Joint Ex. 2, pp. 26-27.) WFLN had represented to the Commission in response to an inquiry concerning its EEO program, *1972 License Renewal Applications*, 53 FCC 2d 104, 118 (1975), that the job description for the position of "Programmer/Cataloguer" required a "love" of classical music, and the job description for the position of "Announcer" required "a working knowledge of classical music" and "a reading knowledge of French, German, Italian and Spanish as well as English." (Joint Ex. 2, Ex. 1, pp. 20, 21.) WFLN had argued that it was the only classical music station in the market, and that because its format was "highly specialized[,] [o]ver the years, it has been difficult to find *any* employees with the skills required in musical knowledge and foreign languages." (*Id.* at Ex. 1, p. 25, emphasis in original.) In denying the EEO challenge to WFLN and renewing its license, the Commission did not comment on this argument by WFLN. (*Id.* at Ex. 2; *Franklin Broadcasting Company*, 57 FCC 2d 130 (1975).) Reed Miller, the Arnold & Porter partner who had been involved in the WFLN case, may have discussed that case with Ms. Cranberg or mentioned it to her as a precedent. (Joint Ex. 2, pp. 26-30.)

158. Arnold & Porter acknowledged in the Opposition that the Stations were unaware of any statistics regarding the percentage of minorities with classical music training. (Church Ex. 4, Att. 7, p. 15.) Therefore, the law firm cited to the statistic regarding minority listeners "by rough analogy." (Church Ex. 8, p. 7.) Ms. Cranberg testified that this was an attempt to establish

> a measure that would overstate the availability, would be a measure of persons who listen to the only full-time classical music station in the city. I assumed that persons who have expertise or interest or knowledge about classical music would likely in many cases listen to the only full-time classical music station in the city.

(Tr. 1025-26.)

159. Ms. Cranberg testified that in drafting the Opposition and subsequent pleadings, she used as synonyms the terms "knowledge of classical music," "classical music training," "expertise in classical music," and a "working knowledge of classical music." Specifically, all of the terms meant that persons hired for the relevant positions had to have a "fairly significant knowledge of classical music." Ms. Cranberg testified that she did not intend to mislead the Commission by using these different expressions to refer to the same idea. (Church Ex. 8, p. 6 n.2.)

160. Ms. Cranberg later learned that while the station sought salespeople with knowledge of classical music, it did hire people without such knowledge. (Tr. 1028-30.) According to Ms. Cranberg, the statement in the Opposition that knowledge of classical music was a "requirement" was "probably an overstatement," and Ms. Cranberg commented: "I wish that I had used another word." (Tr. 1027-28.) Ms. Cranberg testified that there was no intention to mislead the Commission by using the word "requirement" in the Opposition. (Church Ex. 8, p. 6 n.2.)

161. Ms. Cranberg further testified that she did not believe the fact that the station hired people without a classical music background negated the argument she had formulated, stating:

> I think it's still a legitimate point to make. The, the very point is that it's difficult to find people with that background and that there is not a great availability of any race, and so the fact that the station hasn't been able to find people with, with this background in all cases I don't think undermines the point that was being made.

(Tr. 1028.)

162. However, the Church's February 23, 1990, Opposition also contained the following statement:

> [T]he specialized nature of KFUO's program formats have resulted in the stations' receiving a large number of qualified "write-in" applicants each year. The reason is clear -- because there are relatively few classical music or Lutheran religious stations in the country, those persons with a particular expertise in classical music, or a Lutheran theological background, actively solicit positions at stations such as KFUO. When a given job vacancy occurs, KFUO typically has available to it some 20 resumes on file for persons with the specific qualifications KFUO seeks. [Footnote]
>
> * * *
>
> [Footnote] Indeed, a number of KFUO's employees originally came to the stations as dedicated volunteers with a special interest in theology and/or classical music.

(Church Ex. 4, Att. 7, pp. 16-17.)

163. Similarly, in a May 12, 1992, letter in response to an April 22, 1992, Commission letter of inquiry (MMB Ex. 5), the Church stated:

> As noted in our [Opposition,] we do not use outside recruitment sources for *every* opening at the stations (although we have used them increasingly in recent years in an effort to increase our minority employment . . .). This is due to the fact that the religious

> and classical music formats of our stations attract numerous unsolicited applications from prospective employees around the country with a particular interest/expertise in these areas[.]

(MMB Ex. 6, p. 3, emphasis in original.)

164. In addition, in a Motion to Strike and Reply to Comments, filed on September 21, 1992, the Church maintained that "[b]ecause there are relatively few classical music and Lutheran religious stations, KFUO receives many unsolicited resumes from qualified applicants around the country with special expertise in classical music or Lutheran theology." (MMB Ex. 11, p. 13 n.3.) The Motion to Strike and Reply also stated that "nearly all of the full-time hiring opportunities which occurred at the stations during the license term required particular training either in classical music or Lutheran theology." (*Id.* at p. 11.) In this regard, the Motion represented that "[o]f the 35 full-time hires made from October 1, 1986 through January 31, 1990, 26 required either Lutheran theological background or classical music knowledge." (*Id.* at p. 11 n.5.)

165. On November 17, 1992, the Commission asked the Church for an explanation of "those aspects of the duties and responsibilities of the salespersons (14 positions) which require knowledge of classical music." The Church was also asked to "indicate the classical music background of persons hired for the above noted 14 FM sales positions." (MMB Ex. 13, pp. 1-2.)

166. In its December 28, 1992, Reply to FCC Letter of Inquiry, the Church stated:

> The Commission has requested additional information concerning the requirement that KFUO-FM salespeople be knowledgeable about classical music. KFUO-FM enforces this requirement by making every effort to hire such persons whenever it can; it only employs salespeople who do not possess this expertise on those occasions when it is unable to secure suitable persons with the requisite classical music background.

(MMB Ex. 14, p. 14.) The Reply only identified classical music background for 2 of the 14 salespersons hired by the Church up to that point (Frank Wood and Glynelle Wells). (*Id.* at pp. 19-20, 70-72.) The Reply also noted that most of the salespersons hired had since left the station, that KFUO-FM did not have resumes for these former employees, and that Mr. Stortz knew "from personal experience that a large number of our sales staff during the license term were knowledgeable about classical music, although not all were." (*Id.* at pp. 19, 61.) The Reply was drafted by Ms. Cranberg based on information supplied to her by station staff. (Tr. 975.)

167. In an affidavit appended to the Reply, Mr. Stortz stated, in pertinent part:

> We have tried in good faith to supply the information requested [by the Commission], and have not intended to mislead the Commission in any way. I would point out that I am not an attorney, and am perhaps not accustomed to providing the level of detail and precision with which attorneys, and those who deal with them frequently, may be more familiar. For example, when I advised the FCC that it is a requirement that KFUO-FM salespeople possess a background in classical music, I believed and continue to believe that that was true, because KFUO-FM wants its salespeople to possess a background in classical music, and only when we are unable to locate such prospective employees do we hire salespeople without that background. Once the Commission raised a question about our employment practices in this regard, I recognized that I might have provided further detail about our hiring policies in this respect to ensure that the Commission understood that while we seek only salespeople with a classical music background, we are not always successful.

(MMB Ex. 14, pp. 63-64.)

168. Reverend Devantier did not object to Arnold & Porter's use of the argument about the need for "very specialized skills" (MMB Ex. 14, p. 44) because it was prepared by the Stations' legal counsel "in whom we had some confidence to know about such things" (Tr. 834). When offense was apparently taken to the arguments about knowledge of classical music and the use of alternative statistics, Dennis Stortz faxed Ms. Cranberg a note, dated September 17, 1992, making it clear to her that, while the FM station's classical music knowledge requirement was real, he did not want it to be construed as an "excuse." Mr. Stortz stated in his fax note: "While all of this information about classical music knowledge and Lutheran' requirements is true and applicable, I don't want to make it sound like an excuse. It is what we do as radio stations, and there is no bent toward discrimination." (Church Ex. 4, pp. 10-11 n.2 and Att. 8.)

E. Management Turnover

169. The February 23, 1990, Opposition to Petition to Deny contained the additional argument that the Stations "experienced a tremendous degree of management turnover" during the License Term, and that this "lack of consistent leadership" increased the difficulties in maintaining "a consistent recruitment program." The Opposition noted that there were seven different managers between the two stations during the License Term, and that they were typically Lutheran ministers without broadcasting experience. The Opposition stated that a new "lay" manager with "significant broadcast experience" had been hired in 1988, and that the Church was "hopeful" that a "more stable management" would afford the opportunity to focus on a number of areas requiring attention, "including employee recruitment." (Church Ex. 4, Att. 7, pp. 7, 17-18.) According to Ms. Cranberg, Arnold & Porter originated the argument that "the management turnover should be taken into account in assessing a station's compliance with EEO requirements." (Tr. 996-97.)

III. Misrepresentation/Lack of Candor Issue

170. In specifying the misrepresentation/lack of candor issue against the Church, the *HDO* cited the following matters:

> (a) the discrepancy between the number of total hires during the 12 months preceding renewal reported in the Church's renewal application and renewal supplement, and the actual number of hires (*HDO* at para. 27);
>
> (b) the Church's explanation of that discrepancy (*id.*);
>
> (c) the Church's responses to Commission inquiries regarding the specifics of its EEO outreach efforts, particularly the representations regarding its recruitment program (*id.* at paras. 28-29);
>
> (d) the Church's arrangement with Concordia Seminary (*id.* at para. 29);
>
> (e) the Church's requirement for knowledge of Lutheran doctrine (*id.*); and
>
> (f) the Church's requirement for knowledge of classical music for sales positions at the FM station (*id.* at paras. 29-30).

The Church's outreach and recruiting program, the arrangement with Concordia Seminary, and the requirements for Lutheran and classical music knowledge have been discussed in earlier sections of the Findings of Fact and need not be repeated at this point. Therefore, this section will concentrate on the discrepancy between the number of total hires initially reported to the Commission and the actual number of hires, and the Church's explanation for the discrepancy.

171. The FCC Form 396 Broadcast EEO Program which was included with the 1989 license renewal applications was prepared by Paula Zika, the Director of Business Affairs at the Stations. Ms. Zika had been employed at the Stations since January 1971 working in a variety of positions relating to station operations. Since the early-to-mid 1980s, Ms. Zika served in the capacity of Director of Business Services, although the title of that position changed several times over the years. From 1987 to 1991, her title was Director of Station Operations. With the exception of the Stations' Chief Engineer and the Assistant Engineer, Ms. Zika had worked at the Stations longer than any other employee. (Church Ex. 3, p. 1; Tr. 325-26.)

172. Over the years, Ms. Zika's responsibilities included handling administrative and business matters for the Stations, including personnel matters. She also prepared FCC forms for the Stations. When the 1989 license renewal packet arrived, Ms. Zika was given the responsibility of gathering the necessary information and typing the applications. During her time at the Stations, she had prepared FCC filings for a number of different general managers and acting general managers. In preparing the FCC Form 396 Broadcast EEO Program to be included with the 1989 license renewal applications, Ms. Zika reviewed the EEO Program filed with the Stations' 1982 renewals and typed the 1989 EEO information using the Stations' 1982 Program as the basis. (Church Ex. 3, p. 1; Tr. 326-29.)

173. In responding to the questions on the Form 396, Ms. Zika went through the Stations' employment records, which she maintained as part of her duties, to provide the employment figures requested by the FCC. Ms. Zika compiled the data regarding the question in the Form 396 asking about "Job Hires." (Church Ex. 3, pp. 1-2.) This question asked for the following information, *inter alia:*

> During the twelve-month period prior to filing this application beginning (Month-Day-Year) _____ and ending (Month-Day-Year), _____ we hired:
> Total hires _____ Minorities _____ Women _____

(Church Ex. 9, p. 4.) Neither the form nor the Filing Instructions specified whether the response should include part-time as well as full-time employees, or whether the renewal applicant should count people hired who thereafter departed before the end of the period. (Church Ex. 9.)

174. Ms. Zika testified that she misinterpreted the question. (Tr. 341-42.) Specifically, she thought that the question was asking only for full-time hires during the past 12 months who were still employed at the Stations at the time the renewal applications were being prepared. She did not believe the question was asking for hires who were no longer working at the Stations. (Church Ex. 3, p. 2; Tr. 341-42.) Although Ms. Zika had worked on the 1982 FCC Form 396 which had a similar question, she had not made the calculations to answer the "Job Hires" question in the 1982 application. (Church Ex. 3, pp. 1-2.)

175. Based on her understanding of the question on "Job Hires" in the Form 396, Ms. Zika answered: "During the twelve month period beginning October 1, 1988 and ending September 30, 1989, we hired a total of six persons, two white males and four white females." She reached this figure by adding the full-time hires in the previous 12 months who were still working at the Stations in September 1989. (Church Ex. 3, p. 2; Tr. 330-31.)

176. Mr. Stortz, the general manager in September 1989, recalled reading through the Form 396 EEO Program during the preparation of the renewal applications, but he did not ask Ms. Zika about the information on "Job Hires." He was aware that, in completing the applications, she had reviewed the employment records which she kept. (Church Ex. 4, p. 19.)

177. After the EEO Program for the renewal applications was prepared, Mr. Stortz asked Ms. Zika to send it to Ms. Cranberg for review. Ms. Cranberg did not suggest any material changes. Nor did she state that the Stations needed to enumerate explicitly all the criteria used to hire personnel, such as religious training, or to "remind" the Commission of the Stations' relationship to Concordia Seminary. (Church Ex. 4, pp. 18-19.) In this regard, neither Reverend Devantier, nor anyone at his instruction, kept Arnold & Porter apprised of the Stations' EEO policies, programs, and practices. Rather, Reverend Devantier "trusted those individuals in positions of responsibility at the station to do what was appropriate." (Tr. 810-11.)

178. After the renewal applications were completed, they were forwarded to Reverend Devantier so that he could have them signed by the Reverend Dr. Bohlmann, who was then President of the Church. (Church Ex. 4, p. 19.) Reverend Dr. Bohlmann signed the Stations' renewal applications and sent them on for filing with the Commission. He stated that they "appeared to be in order[,] [and]

[w]e have always been proud of the Stations' track record of programming service and their commitment to non-discrimination." (Church Ex. 1, p. 2; Tr. 278.)

179. The KFUO(AM) and FM renewal applications were filed with the Commission on September 29, 1989. (Church Ex. 4, Att. 16.) The Commission requested that the Church provide certain supplemental information, and the Church filed an EEO Supplement on December 29, 1989. (MMB Ex. 2.) That Supplement, like the renewal applications, stated that during the 12-month period beginning October 1, 1988, and ending September 30, 1989, the Stations hired a total of 6 persons, 2 white males and 4 white females. (*Id.* at p. 5.) Mr. Stortz assisted Ms. Cranberg in the preparation of the Supplement. (Church Ex. 4, p. 19.)

180. On January 2, 1990, the NAACP filed its Petition to Deny the Church's license renewal applications. (MMB Ex. 3.) On January 4, 1990, the Commission sent a letter to Reverend Devantier asking for detailed information concerning full-time and part-time job hires at KFUO during the three-year time period from October 1, 1986, to October 1, 1989. (MMB Ex. 4.) At the direction of Reverend Devantier, Ms. Zika and Mr. Stortz gathered the information requested for that three-year period. (Church Ex. 4, p. 20.) Ms. Zika and Mr. Stortz reviewed the Stations' records and collected the names, dates of hires, and the full-time or part-time status of hires over the previous three years. (Church Ex. 3, p. 2.) They sent the information to Ms. Cranberg for inclusion in the Opposition that was filed by the Church on February 23, 1990, as a response to the Petition to Deny and to the January 4, 1990, FCC letter. (Church Ex. 4, p. 20.)

181. Included in the information submitted with the Opposition was a document entitled "Table Three," which supplied the information requested by the Commission for each position filled at the Stations during the three-year period in question. When Ms. Zika and Mr. Stortz compiled the data in Table Three for the Opposition, they did not notice any disparity between that information and the information contained in the EEO Program that was appended to the 1989 license renewal applications. (Church Ex. 4, p. 20 and Att. 7 pp. 26-33.)

182. There was no further mention of the hire data until the FCC requested additional information in a June 26, 1992, letter to the Reverend Dr. Bohlmann. Therein, for the first time in more than two years, the FCC sought clarification as to why the original renewal applications listed 6 hires for the time period October 1, 1988, to September 30, 1989, while the February 1990 Opposition indicated that there had been 14 hires (10 full-time and 4 part-time) during that time period. (Church Ex. 4, p. 21; MMB Ex. 8.)

183. Upon reviewing this letter, Mr. Stortz examined the renewal applications and the Opposition to ascertain the reasons for the discrepancy. He sent Ms. Cranberg a letter stating that he did not "have a ready explaination [sic]." (Church Ex. 4, p. 21 and Att. 17.) Mr. Stortz asked Ms. Zika how she had arrived at the number six for the total number of hires in completing the renewal applications. (*Id.* at p. 21.) Ms. Zika told Mr. Stortz that she believed the difference in the answers was probably the result of the two different questions asked by the FCC. In the license renewal applications, the FCC had requested the number of "total hires," which Ms. Zika interpreted to mean the "net gain" of full-time hires. She had not counted employees who were hired in 1989 but who had already left by mid-September 1989 when the renewal applications were completed, since such employees had no impact on the Stations' minority or female employment profile as of the time the renewal applications were filed. Because of this, Ms. Zika told Mr. Stortz that the Stations had a "net gain" of six persons during this period and the Stations, in the license renewal applications, had referred to this "net gain" as the total number of persons hired. (Church Ex. 3.) Ms. Zika wrote a note to Mr. Stortz at the time stating that the relevant portion of the EEO Program should have stated that the Stations had a "net gain of six persons" rather than "hired" six persons. (*Id.* at Att. 1; Tr. 343-44.) At the hearing, Ms. Zika testified:

> [T]he statement [in the renewal applications that the stations "hired" 6 persons] was correct insofar as I, I had understood the question. In, in checking, I realized that I had used only full time hires and people that were still working at the station. I did not count part-time, and I did not count the hires that had come and gone in that particular period.

(Tr. 335.)

184. In contrast, the January 4, 1990, letter from the Commission had asked for specific information for "each position filled" between October 1, 1986, and October 1, 1989, including its "full or part-time status." (MMB Ex. 4.) When Ms. Zika and Mr. Stortz gathered the information for Table Three in the Opposition, they reviewed all payroll and personnel records for the time period for both full-time and part-time employees and listed every hire, as requested in the January 4 letter, as opposed to the total hires, as requested in the renewal applications. (Church Ex. 4, pp. 21-22.)

185. On July 13, 1992, the Church filed a letter with the FCC in response to a June 26, 1992, letter of inquiry from the Commission. (MMB Exs. 8 and 9.) In this response, Mr. Stortz indicated that, as he now understood the FCC to interpret the question in the renewal applications, the number six included under the "Job Hires" section was inaccurate, and that section should have stated there was "a Net Gain of six persons during this period" rather than six persons "hired." (Church Ex. 4, pp. 22.) The Church's December 28, 1992, reply to an FCC letter of inquiry dated November 17, 1992, repeated Mr. Stortz's understanding that there had been a "net gain" of six employees during the time period beginning October 1, 1988, and ending September 30, 1989. (MMB Ex. 13; MMB Ex. 14, pp. 28-30.)

186. Subsequent to the February 1, 1994, release of the *HDO* in this proceeding, Ms. Zika and Mr. Stortz once again examined the Stations' records to try to confirm exactly how the discrepancy in the number of total hires had occurred. (Church Ex. 3, p. 3; Church Ex. 4, p. 22.) Ms. Zika had interpreted the question in the renewal applications to encompass only full-time hires. Consequently, she had not counted the four part-time employees who were listed in the Opposition.[21] Most of the Stations' part-

[21] As noted above, neither the FCC Form 396 nor the Filing Instructions specifically requested information on part-time

time employees were from Concordia Seminary. They typically worked only 6 to 12 hours per week and received no employee benefits. In effect, they were paid interns. For this reason, Ms. Zika and Mr. Stortz testified that they believed the discrepancy referred to by the FCC should have been 6 versus 10 rather than 6 versus 14. (Church Ex. 3, pp. 3-4; Church Ex. 4, pp. 22-23.)

187. Ms. Zika reached the number six set forth in the license renewal applications because she did not count employees who were hired in 1989 but who had left the Stations before mid-September 1989 when she prepared the applications. There were two such employees. She also did not count a third employee, Reverend David Schultz, who was hired to be the new AM general manager on September 25, 1989, but who did not actually start work until after October 1, 1989. At the time Ms. Zika prepared the renewal applications in mid-September 1989, she had not been told that Reverend Schultz had been hired and did not count him among the hires for that time period. (Church Ex. 3, p. 4; Church Ex. 4, pp. 23-24; Tr. 338-39.)

188. Based on her review of the Stations' records after the *HDO* was released, Ms. Zika discovered that the only full-time employee who was hired between October 1, 1988, and September 30, 1989, that she inadvertently failed to list was Robert Thomson, a white male, who was hired as a salesperson on October 24, 1988. (Church Ex. 3, p. 4; Tr. 339.) Since the Stations did not have computerized employee records during the license renewal period, and Ms. Zika had not remembered any hires in the last quarter of 1988 when she was preparing the license renewal applications, she did not check Mr. Thomson's hire date in his personnel record and inadvertently failed to count him. Ms. Zika explained that the "net gain" of full-time hires between October 1, 1988, and September 30, 1989, was therefore actually seven rather than the six stated in the license renewal applications. Three of the hires were white males and four were white females. (Church Ex. 3, pp. 4-5.)

189. When it came time in January and February 1990 to review the payroll records to answer the detailed questions about each hire as requested in the Commission's January 4, 1990, letter, it was found that Reverend Schultz was added to the payroll on September 25, 1989, and so that date was used in Table Three of the Opposition. When Ms. Zika and Mr. Stortz reviewed the 1986, 1987, 1988, and 1989 payroll records to create Table Three, Mr. Thomson was also included. (Church Ex. 4, pp. 23-24.)

190. In Mr. Stortz's opinion, the discrepancy between the number of hires in the renewal applications and Table Three of the Opposition was "unfortunate" because it caused "much confusion and expenditure of effort." However, Mr. Stortz believed it was the result of Ms. Zika's good faith effort to answer the question that she believed the FCC had posed in the renewal applications. (Church Ex. 4, p. 25.) Ms. Zika testified that she never intended to deceive the Commission in any way. She stated that the discrepancy was simply the result of her confusion regarding the question posed in Form 396, her failure to recall that Mr. Thomson had been hired during the relevant 12-month period, and her lack of knowledge that Reverend Schultz was to be hired during the relevant period. (Church Ex. 3, p. 5)

191. Similarly, according to Mr. Stortz, while the explanation for the discrepancy proved to be more complicated than the simple "net gain" of employees that he originally understood it to be, that "misunderstanding" resulted from confusion between Mr. Stortz and Ms. Zika as to what was meant by "net gain." Because of the complexity of the events that occurred, the misunderstanding went undetected until the matter was re-examined after the *HDO* was released. Although the information concerning "total hires" submitted to the FCC in the license renewal applications may not have been fully accurate, Mr. Stortz testified that any inaccuracies were unintentional and the result of a good-faith misinterpretation. According to Mr. Stortz, there was no intent to deceive the FCC on these or any other matters. (Church Ex. 4, pp. 25-26.)

CONCLUSIONS OF LAW

192. This proceeding involves the applications of The Lutheran Church-Missouri Synod for renewal of its licenses for Stations KFUO(AM) and KFUO-FM, Clayton, Missouri. Issues were specified to determine whether the Church complied with the nondiscrimination and affirmative action provisions of the Commission's EEO rule, whether the Church made misrepresentations of fact or was lacking in candor with regard to the Stations' EEO program, and whether a grant of the renewal applications would serve the public interest, convenience and necessity.

I. Issue 1 -- Compliance with the EEO Rule and Policies

193. The findings establish, and it is concluded, that the Stations, while not discriminating against any person because of race or color, improperly gave preferential hiring treatment to individuals with knowledge of the LCMS or Lutheran doctrine, and to active members of Christian or LCMS congregations, for positions which were not reasonably connected with the espousal of the Church's religious views. It is also concluded that, during the period from February 1, 1983, to August 3, 1987, the Stations' overall affirmative action efforts, though flawed, were acceptable. However, it must additionally be concluded that, during the period from August 3, 1987, to February 1, 1990, the Stations' overall affirmative action efforts were unsatisfactory, and were not in substantial compliance with Sections 73.2080(b) and (c) of the Commission's Rules.

A. Nondiscrimination Aspect of the EEO Rule

194. The findings establish that no individual was discriminated against by the Stations because of race, color, religion, national origin, or sex. There is not one scintilla of evidence in the record to indicate that any adverse discriminatory act ever occurred, or that any individual ever even made an allegation of racial or other discrimination regarding the Stations' employment practices. In this regard, not a single exhibit was submitted indicating that any employee, or applicant for employment at the Stations,

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hires. In this regard, the Filing Instructions indicated that it was only necessary to complete and file the Form 396 with the Commission if the station employed five or more full-time employees. (Church Ex. 9.)

had alleged that he or she had been the victim of discrimination. Nor was any evidence produced that any potential applicant was ever discouraged from applying to the Stations because of his or her race or religion. Similarly, several witnesses testified that they were not aware of any acts of racial discrimination at the Stations or allegations to that effect. Where allegations of discrimination have been made but, as here, investigation revealed no complaints or other evidence of discrimination, the questions have been resolved in favor of the licensee. *Applications of Certain Television Stations Serving Communities in the State of California*, 6 FCC Rcd 2340, 2343 (1991), *recon. denied* 8 FCC Rcd 417 (1993); *CBS, Inc.*, 88 FCC 2d 649, 668-69 (1991).

195. Further, the Church has made efforts throughout the years to eliminate racism and discrimination, and to further the presence of African Americans in the Church. The Church has approximately 50,000 African American members out of a total membership of 2.6 million, has African American Lutheran pastors serving both African American and white congregations, and has African Americans serving in the national, regional, district, and area Church leadership. There is also African American representation at the schools operated by the Church, and the Church has a history of providing educational opportunities for minorities. Moreover, Reverend Devantier, the "CEO" of the Stations during the License Term, has two bi-racial children in his own household, one adopted, and one a foster child.

196. During the course of the License Term, and prior to the filing of the NAACP's Petition to Deny, the Stations hired one Hispanic (Caridad Perez), and four African American employees (Ruth Clerkly, Helen Richardson, Lisa Harrison, and Cynthia Blades).[22] Ms. Perez was hired for a Top Four job category position. The Stations also employed one other African American (Lula Daniels) in a Top Four position until her death, and considered another African American (Ruth Clerkly) for promotion to a management-level position. If the Church had been bent on racial discrimination, it is highly unlikely that these African American or Hispanic individuals would have filled any position at the Stations.

197. The NAACP contends that the FM station's classical music knowledge employment criterion is an indicator of a discriminatory intent on the part of the Church. However, the record reflects no evidence of a racially discriminatory intent behind that criterion. The evidence establishes that the Church was advised by Peter J. Cleary, the founder of CMBS and the Stations' outside consultant, that classical music experience was a valuable job qualification for salespersons. Mr. Cleary's rationale for his view was completely reasonable and logical, and is fully credited. In addition, there was no evidence that any minority applicant was turned away or discouraged from applying for a job at KFUO-FM because of a lack of classical music expertise. It does not, therefore, appear that the criterion was ever used as a pretext for discrimination.

198. In its Opposition to Petition to Deny, the Church argued that any lack of minorities at KFUO-FM should be excused because there were a minuscule number of minorities in the service area who were interested in classical music. The *HDO* apparently considered this argument as "inherently discriminatory." (*HDO* at paras. 25-26.) However, the advancement of such an argument, in and of itself, does not establish a discriminatory mind-set on the part of the Church. In *License Renewal Applications of Pasco Pinellas Broadcasting Co.*, 8 FCC Rcd 398, 399 (1993), *aff'd sub nom. Florida State Conference of NAACP v. FCC*, 24 F.3d 271 (D.C. Cir. 1994), the Commission specifically rejected a contention by the NAACP that it should analyze an EEO defense concerning the availability of minority job applicants to determine whether it was indicative of a discriminatory intent on the part of the licensee. The Court of Appeals agreed with the Commission, stating that "[w]e do not understand [the NAACP's] argument. . . . The [licensee] was only submitting an explanation to meet the inference of discrimination that [the NAACP] sought to draw from the statistics." 24 F. 3d at 274. Similar defenses have also been raised by licensees in a number of other EEO proceedings, and in none of them has the Commission even questioned the appropriateness of making the defense, much less found that it indicated a discriminatory mind-set. *E.g., Sun Mountain Broadcasting, Inc.*, 9 FCC Rcd 2124, 2125-26, 2126 n.11 (1994); *San Luis Obispo Limited Partnership*, 9 FCC Rcd 894, 903 n.20 (1994); *Winfas, Inc.*, 5 FCC Rcd 4902, 4902-03, 4904-05 (1990), *recon. denied* 8 FCC Rcd 3897 (1993); *Delaware Broadcasting Co.*, 58 RR 2d 1297, 1299 n.6 (1985); *Voice of Charlotte Broadcasting Co.*, 77 FCC 2d 299, 300 (1980).

199. In this regard, when the EEO processing guidelines were revised in 1980, the Commission itself stated that if a broadcaster's minority hires were low,

> [t]he Commission will, in its in-depth reviews, take cognizance of a licensee's inability to employ women or minorities in positions for which the licensee documents that only a very limited number of women or minority group members have the requisite skills. The licensee should show in its EEO program that the skills are in fact required, and provide Census or similar data indicating that, as to women or minorities, individuals possessing these skills are as yet in short supply. . . .

Equal Employment Opportunity Processing Guideline Modifications for Broadcast Renewal Applicants, supra, 79 FCC 2d at 932, 47 RR 2d at 1697. *See also Equal Opportunity Rules for Broadcasters, supra* at 3973. Whether or not the Commission accepts such a defense on the merits, a licensee cannot be faulted for making the very argument that the Commission invited it to make.

200. Although there was no evidence that the Stations intentionally discriminated against any particular individual on the basis of race, color, religion, national origin or sex, the findings establish that the Stations improperly gave preferential hiring treatment to individuals with knowledge of the LCMS or Lutheran doctrine, and to active members of Christian or LCMS congregations, for positions which

[22] The Stations also hired Bridget Williams and Timothy Meeks, both African Americans, after the NAACP filed its Petition to Deny and after the January 4, 1990, Commission letter of inquiry. Since the Church then knew that the Stations' hiring practices with respect to African Americans were under review, the hiring of these two minorities is not probative and the Church will be given no credit therefor. *Cf. Rust Communications Group, Inc.*, 73 FCC 2d 39, 53-54 (1979); *Alabama Educational Television Commission*, 50 FCC 2d 461, 475-76 (1975).

were not reasonably connected with the espousal of the Church's religious views. In this category were receptionist, secretarial, engineering, and business manager positions. In addition, the Stations' employment application in use from 1986 or 1987 to the end of April 1989, clearly stated that the Church's policy was to give preference to "persons who are members in good standing of an LCMS congregation."

201. These hiring practices are contrary to the holding in *King's Garden, supra,* that a station licensed to a religious organization may discriminate on the basis of religion in its employment practices only as to those hired to espouse the licensee's religious philosophy over the air. Conversely, religious licensees may not discriminate "in the employment of persons whose work is not connected with the espousal of the licensee's religious views." 34 FCC 2d at 938.

202. The Church argues that *King's Garden* has been, in effect, overruled by *Corporation of the Presiding Bishop v. Amos,* 483 U.S. 327 (1987). This is erroneous. *Amos* did not overrule *King's Garden. Amos* held that the blanket exemption for religious institutions in Title VII of the Civil Rights Act is constitutional "as applied to the nonprofit activities of religious employers." 483 U.S. at 339. Neither the Communications Act nor the Commission's Rules contain such an exemption, and the Commission and the courts have consistently distinguished the Commission's EEO requirements from those of Title VII. *See, e.g., Florida State Conference of NAACP v. FCC, supra* at 274 n.4; *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC,* 595 F.2d 621, 628 (D.C. Cir. 1978) ("the FCC is not the Equal Employment Opportunity Commission . . . , and a license renewal proceeding is not a Title VII suit").

203. The Church's reliance on *dicta* in *King's Garden,* which opined that the Title VII exemption was unconstitutional, is misplaced. The analysis and holding of the *King's Garden* majority was not based on the premise that the Title VII exemption was unconstitutional. Rather, *King's Garden* held that the exemption was not relevant to the Commission's EEO requirements. 498 F.2d at 58. Indeed, it was for this very reason that Judge Bazelon did not join in the opinion. His concurrence was based on his view that the exemption was applicable, but unconstitutional. *Id.* at 61.

204. The Church also contends that its own judgement as to which employment positions require religious knowledge, training or expertise may not be subjected to second-guessing by a government agency such as the Commission. This position is without merit. As the Commission stated in *Faith Center, Inc.,* 82 FCC 2d 1, 21 (1980), *recon. denied* 86 FCC 2d 891 (1981), such an interpretation "would tend to create a favored class of licensees immune from Commission scrutiny although questions justifying inquiry into other licensees existed." The Commission also noted that "evenhanded inquiry into allegations of misconduct by both religious and secular licensees places the government in a less objectionable posture." *Id.* Further, the *King's Garden* court observed:

> A religious sect has no constitutional right to convert a licensed communications franchise into a church. A religious group, like any other, may buy and operate a licensed radio or television station. . . . But, like any other group, a religious sect takes its franchise "burdened by enforceable public obligations."
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> * * *
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> [A religious sect] confronts the FCC's rules only because the sect has sought out the temporary privilege of holding a broadcasting license. . . . But the Constitution does not obligate the FCC to relinquish its regulatory mandate so that religious sects may merge their licensed franchises completely into their ecclesiastical structures.
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> * * *
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> Where a job position has no substantial connection with program content, or where the connection is with a program having no religious dimension, enforcement of the Commission's anti-bias rules will not compromise the licensee's freedom of religious expression.

498 F.2d at 60-61 (citations omitted).

B. Affirmative Action Aspect of the EEO Rule

205. **February 1, 1983, to August 3, 1987.** The findings establish that, during the period from February 1, 1983, to August 3, 1987, the Stations' overall affirmative action efforts, though flawed, were in substantial compliance with the Commission's rules. In reaching this conclusion, it has been recognized that a significant amount of time has passed since the occurrence of the activities under review and that the Commission's EEO policies have evolved both during and after this time period. Consequently, it is necessary to construct the appropriate historical context by which to judge the affirmative action efforts of the Stations.

206. From February 1, 1983, to August 3, 1987, the standard being used by the Commission for processing renewal applications was result-oriented. *See EEO Processing Guidelines for Broadcast Renewal Applicants,* 46 RR 2d 1693 (1980), *recon. denied* 79 FCC 2d 922 (1980). Licensees were generally free to craft their own approach to affirmative action as long as they could demonstrate that it resulted in minority hires. *Id.* For stations such as KFUO(AM) and KFUO-FM, the *EEO Processing Guidelines* provided that:

> Stations with 11 or more full-time employees will have their EEO programs reviewed if minority groups and/or women are not employed full-time at a ratio of 50 percent of their availability in the workforce overall and 50 percent in the upper-four job categories.

Id. at 1693.

207. Licensees were further guided by the provisions of Section 73.2080(b) of the Commission's Rules which, with very minor changes not pertinent here, continued in effect throughout the License Term. *Compare* Section 73.2080(b) as adopted in *FCC Form 395--EEO,* 70 FCC 2d 1466, 1480 (1979), *with* the current Section 73.2080(b) of the Rules. This section required each broadcast station to "establish, maintain, and carry out, a positive continuing program of specific practices designed to assure equal opportunity in every aspect of station employment policy and practice." Under the terms of such a program, a station was required to: (1) define management responsibility for the application and enforcement of the EEO policy and establish a procedure to review the performance of management (Section 73.2080(b)(1)); (2) inform its employees and prospective employees of the EEO policy (Section 73.2080(b)(2)); (3)

communicate its EEO policy and program and its employment needs to nondiscriminatory sources of qualified applicants and solicit their recruitment assistance on a continuing basis (Section 73.2080(b)(3)); (4) conduct a continuing campaign to exclude every form of prejudice or discrimination from the station's personnel practices and policies (Section 73.2080(b)(4)); and (5) conduct a continuing review of job structure and employment practices and adopt positive recruitment, job design and other measures needed to ensure genuine equality of opportunity (Section 73.2080(b)(5)).

208. Although the Stations' 1982 and 1983 EEO Programs touched on all of the elements included in Section 73.2080(b) of the Rules, there does not appear to have been any consistent, continuing, or systematic effort made by the Stations to follow through on most of these elements. First, despite the statement that Mr. Anderson, and later Reverend Abatie, was responsible for the Stations' EEO program, there was no evidence establishing that either of these individuals, or any other management-level employee, took any steps to truly oversee, administer or implement a coherent, organized, consistent, or continuous EEO program. Similarly, no evidence was produced that any management-level employee was instructed to implement the Commission's EEO requirements. In this regard, Reverend Devantier admitted that no one was explicitly charged in a position description with noting the presence or absence of minority applicants. There was also no evidence that the Stations established any procedures for reviewing the EEO performance of management.

209. Second, it does not appear that employees and prospective employees were continuously and routinely kept informed of the Stations' EEO policies. The Stations did not distribute to its employees an Employee Handbook, which reflected the Stations' EEO policies, until 1986. The Handbook was published in October 1985, more than two and one-half years after the License Term began. In addition, not all of the Stations' employment advertisements contained a statement that the Stations were Equal Opportunity Employers. Indeed, of the four advertisements contained in the record which were placed prior to the date the NAACP filed its Petition to Deny, three did not contain this statement. Even though the record reflects that these omissions may have been the result of inadvertent errors, the fact remains that the statements were not in the advertisements.

210. Third, it appears that the Stations made some effort to solicit the assistance of likely sources of qualified minority applicants. However, those efforts were sporadic, and were unsuccessful in attracting minorities to the Stations. Indeed, the evidence establishes that the major source of African American employees during the period between February 1, 1983, and August 3, 1987, was Ms. Daniels, who referred two of the three African American hires the Stations made during that time frame. The Stations' other efforts went for naught. Although the Stations placed advertisements for a few positions in the *St. Louis Post Dispatch*, a newspaper which the NAACP's witness, Richard J. Miller, believed was a good source for minority recruitment, no minority hires resulted. In addition, such advertisements commenced more than two and one-half years after the License Term began, and the record does not establish that this newspaper was used on any consistent basis. Similarly, advertisements in *The Lutheran Witness* were not consistently placed and, when they were utilized, resulted in no minority hires. Likewise, even though job openings were posted at the International Center, such postings did not begin until about four years after the commencement of the License Term, and resulted in no minority hires. Nor did the use of the Broadcast Center in St. Louis, a major source of minority referrals for Mr. Miller's stations, result in any minority hires. Even then, the Broadcast Center was not utilized until about four years after the start of the License Term. Fourth, the record does not establish that there was a continuing review, or any review, of the Stations' job structure and recruitment efforts during the period under consideration.

211. Despite the infirmities discussed above, and considering "all the facts of the case," *Bilingual Bicultural, supra* at 627 n.15, the Stations' minority representation for most of the years within the February 1, 1983, to August 3, 1987, time period was satisfactory. Table 3, below, which is based upon the Stations' FCC Form 395s, summarizes the percentage of parity statistics for the Stations during the time period under consideration.

212. Although the percentages appear to be low, the figures are quite misleading. Specifically, for the years 1983, 1984 and 1986, the addition of 0.3 or 0.4 employees would have brought the Stations' overall minority representation up to 50% of parity. For the year 1987, the addition of 1.4 employees would have achieved that result. Similarly, for the years 1983 through 1987, the addition of 0.1 or 0.2 employees at the Top Four job level would have

TABLE 3

As of January 31	Overall Minority Representation	Top Four Job Category Minority Representation
1983	37.7% of parity	45.8% of parity
1984	35.6% of parity	42.7% of parity
1985	75.4% of parity	42.7% of parity
1986	37.7% of parity	0% of parity
1987	0% of parity	0% of parity

brought that category up to 50% of parity. Further, the parity statistics derived from the FCC Form 395s understate the Stations' overall minority representation in 1984 and 1985 because the Stations hired three full-time African Americans who were not employed during the weeks used to complete some of the Form 395s. Moreover, the Stations hired 19 full-time employees between February 1, 1983, and August 3, 1987. Of the 19 new full-time hires, 3 were African American. Thus, 15.8% of the full-time hires in this period were minorities. This figure actually exceeded 100% of parity. It is clear that, on balance, the Stations' affirmative action efforts during the period from February 1, 1983, to August 3, 1987, while flawed, were acceptable because they resulted in minority hires.

213. **August 3, 1987, to February 1, 1990.** The findings establish that, during the period from August 3, 1987, to February 1, 1990, the Stations' overall affirmative action efforts were unsatisfactory. In reaching this conclusion, the historical context of the Commission's EEO policies has again been considered.

214. Effective August 3, 1987, the Commission amended its EEO rule to incorporate the recruitment guidelines that had previously appeared only in its Model EEO Program Reports. *Equal Opportunity Rules for Broadcasters, supra* at 3968-69. The Commission also de-emphasized the use of statistics to evaluate a licensee's EEO program and emphasized the overall efforts made by the licensee to operate in a nondiscriminatory manner. To this end, the Commission adopted a new two-step approach for processing renewal applications. Under that approach, the Commission's procedure was first to examine the EEO information submitted with the renewal application to determine whether the licensee's overall EEO efforts had been satisfactory. If the Commission was unable to make that determination, an investigation of the deficiencies was to be initiated. The investigation was to involve requests that the licensee submit additional information concerning the specific areas of its EEO program that appeared deficient. *Id.* at 3968, 3973-74.

215. The Commission's new rule, Section 73.2080(c), stated that a station's EEO program "should reasonably" address itself, to the extent possible and to the extent appropriate to the station's size and location, to the following areas: (1) disseminating its EEO program to job applicants and employees (Section 73.2080(c)(1)); (2) using minority organizations, organizations for women, media, educational institutions, and other potential sources of minority and female applicants to supply referrals whenever job vacancies are available in its operation (Section 73.2080(c)(2)); (3) evaluating its employment profile and job turnover against the availability of minorities and women in its recruitment area (Section 73.2080(c)(3)); (4) undertaking to offer promotions of qualified minorities and women in a nondiscriminatory fashion to positions of greater responsibility (Section 73.2080(c)(4)); and (5) analyzing its efforts to recruit, hire, and promote minorities and women and addressing any difficulties encountered in implementing its EEO program (Section 73.2080(c)(5)).

216. The new rule gave several "suggestions" under each subsection of ways in which each of these requirements could be met. The Commission stressed, however, that these suggestions were "not intended to be either exclusive or inclusive," but were made "simply to provide guidance." *Equal Opportunity Rules for Broadcasters, supra* at 3969. Minor changes, not pertinent to this proceeding, were also made in Section 73.2080(b). *Id.* at 3976.

217. The record reflects that, during the period August 3, 1987, to February 1, 1990, the Stations, once again, failed to make any consistent, continuing, or systematic effort to follow through on most of the elements contained in their 1982 and 1983 EEO Programs. This is true despite the laudable efforts of Thomas M. Lauher, the general manager of the FM station from May 1987 to July 1989, to review that station's compliance with the Commission's EEO requirements, and his attempt to correct the deficiencies he found. Mr. Lauher's review began in the fall of 1988 and culminated in March 1989, at which time he sent two memorandums to Reverend Devantier, the Stations' CEO. Although certain EEO program reforms were begun as a consequence of Mr. Lauher's efforts, many were not utilized after his departure in July 1989. Therefore, it cannot be concluded that the Stations were substantially compliant with Sections 73.2080(b) and (c) of the Commission's Rules.

218. First, until the arrival of Mr. Lauher, and after his departure, no management-level employee of the Stations made any attempt to implement a continuous or consistent EEO program. Nor was any management-level employee specifically instructed to put into effect the Commission's EEO requirements. Indeed, after Mr. Lauher left, EEO compliance became the responsibility of both Reverend Devantier and Dennis Stortz. However, there was no discussion of how that responsibility was to be apportioned, and it does not appear that either of these individuals took any steps to carry out the Stations' EEO Program or Mr. Lauher's reforms. Further, the two new general managers of the AM and FM stations did not even know about EEO noncompliance problems until the filing of the NAACP's Petition to Deny in January 1990.

219. Second, during this period, the employment application in use at the Stations did not contain a notice informing prospective employees that discrimination was prohibited and that they could notify the appropriate agencies if they believed they had been the victims of discrimination. On the contrary, the employment application forms contained a statement that the Church retained the right to give hiring preferences to persons who were members in good standing of an LCMS congregation. Although Mr. Lauher corrected these shortcomings, the fact remains that, until he did so, prospective employees were given no notice of the Stations' EEO policies, and the employment application contained a statement that was squarely contrary to the Commissions' EEO policies.

220. Third, although the Stations made an effort to solicit the assistance of likely sources of qualified minority applicants, these efforts were irregular, and were generally unsuccessful in attracting minorities to the Stations. Thus, Mr. Lauher, in initiating the process of hiring salespersons, contacted the St. Louis Broadcast Center and placed advertisements in the *St. Louis Post Dispatch*. As noted earlier, Mr. Miller, the NAACP's witness, identified these as promising sources for minority candidates. In July 1989, about six months prior to the end of the License Term, Mr. Lauher sent letters to 10 local universities and personnel agencies requesting minority and female referrals. The letters mentioned no specific job openings, and stated that the Stations would be contacting the addressees as job openings arose. Although the Stations filled nine full-time and five part-time positions after these letters were sent, no further contacts were made with these organizations, and none of the letters resulted in any referrals of minority applicants. In 1989, the last year of the License Term, the Stations

sought referrals from the Lutheran Employment Project of St. Louis, a clearinghouse run by various Lutheran churches for employment of members of minority groups. These efforts were successful in that, in late 1989, three minority referrals were interviewed and one minority was hired (Cynthia Blades).

221. Fourth, there is no evidence that the Stations formally evaluated their employment profile and job turnover against the availability of minorities and women in their recruitment area. In this regard, it does not appear that the composition of the relevant labor area was compared with the composition of the Stations' workforce. Nor were the Stations' policies and practices examined to determine whether qualified minorities were being inadvertently screened out. However, from the beginning of his term as FM general manager in May 1987, Mr. Lauher did notice that there were no minorities working at the station, and he determined that he wanted to hire minorities. But none were hired until March 1988, nearly a year later, when Caridad Perez, an Hispanic, was hired as a salesperson. There is no indication that Mr. Lauher's desire to hire minorities, or that Ms. Perez' hire in particular, resulted from the type of evaluation contemplated in the Commission's rules.

222. Fifth, the record does not reflect that, from the time of Mr. Lauher's departure to the time the Petition to Deny was filed, there was a continuing review of the Stations' job structure, or that their efforts to recruit and hire minorities were analyzed. In addition, until corrected by Mr. Lauher, the Stations used a selection technique that gave hiring preferences to members in good standing of an LCMS congregation.

II. Issue 2 -- Misrepresentation/Lack of Candor

223. This issue was specified to inquire into the discrepancy between certain hiring figures reported to the Commission by the Church and the Church's explanation for that discrepancy, questions relating to the Church's representations of its outreach efforts and recruitment program, questions regarding the Church's arrangement with Concordia Seminary, and questions concerning the Church's requirement for knowledge of Lutheran doctrine or classical music for certain positions at the Stations. The findings establish, and it is concluded that, while the Church's responses to the Commission's various inquiries were not models of clarity or complete accuracy, none of those responses rises to the level of a disqualifying misrepresentation. However, it must also be concluded that the Church lacked candor in describing the Stations' minority recruitment program in their 1989 renewal applications, and in informing the Commission that knowledge of classical music was a requirement for the position of salesperson at the FM station. These instances of lack of candor constituted willful and repeated violations of Section 73.1015 of the Commission's Rules.[23]

A. Discrepancy in the Number of Job Hires

224. The *HDO* questioned a discrepancy in the number of hires reported by the Stations for the October 1, 1988, to September 30, 1989, time period. The Stations' renewal applications, and a supplement thereto, reported a total of 6 hires, while a February 23, 1990, Opposition to Petition to Deny indicated that there had been 14 hires during this time period (10 full-time and 4 part-time).

225. The findings establish that the discrepancy between the number of hires reported in the renewal applications and supplement, and the number reported in the Opposition, was the result of innocent and inadvertent errors made by Paula Zika, the Stations' Director of Business Affairs. Ms. Zika understood the renewal applications to be asking only for full-time hires during the 12 months preceding the filing of the applications who were still employed at the Stations at the time of filing. She did not believe the question was asking for hires who were no longer working at the Stations, reasoning that no credit could be claimed for hiring employees that had already left and were not part of the Stations' then-current EEO profile.

226. Nor did Ms. Zika believe that part-time hires should be included, because most were students working only 6 to 12 hours per week. In this connection, neither the FCC Form 396 nor the Filing Instructions specified whether the response to the pertinent question should include part-time as well as full-time employees, or whether the renewal application should count people hired who thereafter departed before the end of the filing period. Indeed, the Filing Instructions indicated that it was only necessary to complete and file the Form 396 if a station employed five or more *full-time* employees. There was, therefore, a reasonable and logical basis for Ms. Zika's beliefs.

227. Excluding part-time employees and full-time employees who left the Stations before the end of the reporting period, the findings show that Ms. Zika understated the Stations' total hires by only two employees. Of the two, one employee was hired just before the end of the reporting period, and Ms. Zika had not been informed of his hiring. The remaining employee was simply overlooked by Ms. Zika. None of these errors suggest intentional deceit, or reflect adversely on the basic qualifications of the Church. *See, e.g., National Capital Christian Broadcasting, Inc.*, 3 FCC Rcd 1919, 1922 n.6 (1988); *Radio Station WABZ, Inc.*, 90 FCC 2d 818, 825-27 (1982); *Kaye-Smith Enterprises*, 71 FCC 2d 1402, 1414-16 (1979).

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[23] In its proposed findings of fact and conclusions of law, the NAACP alleges, for the first time, numerous additional misrepresentations which were not raised in the *HDO* in this proceeding. No conclusions will be reached with regard to these new allegations. Suffice it to say, since these matters were initially raised in the NAACP's findings and conclusions, the Church had no notice or opportunity to introduce evidence thereon. In this connection, it is noted that the vast majority of the misrepresentations alleged by the NAACP relate to matters about which it did not cross-examine the witnesses. Therefore, the Church could not even address these matters on re-direct examination. It is axiomatic that the purpose of a hearing designation order is to provide the licensee with notice of the misconduct alleged so that it may have an adequate opportunity to prepare a defense. *Cf. Faith Center, supra* at 9. It would be manifestly unfair and a denial of due process to reach conclusions on matters about which the Church was given no prior notice. *Cf. Algreg Cellular Engineering*, 9 FCC Rcd 5098, 5146 (Rev. Bd. 1994), *recon. denied* 9 FCC Rcd 6753 (Rev. Bd. 1994); *Garrett, Andrews & Letizia, Inc.*, 88 FCC 2d 620, 625 (1981). Nevertheless, to assist the reviewing authorities, findings of fact have been made on these matters.

228. The *HDO* also questioned the Church's failure to submit an explanation for the discrepancy at the time it reported the accurate information to the Commission. The record reflects, however, that the reason for this failure was both simple and innocuous. Specifically, at the time the Opposition containing the correct data was filed by the Church, neither Ms. Zika nor Mr. Stortz noticed that there was a discrepancy between the information contained therein and the hiring data reported with the Stations' renewal applications and supplement.

229. It is important to recognize in this regard that the hiring data contained in the Opposition was submitted in direct response to the Commission's January 4, 1990, letter of inquiry. That letter requested detailed information concerning each and every full-time and part-time position filled during the three-year time period from October 1, 1986, to October 1, 1989. On the other hand, the time frame covered in the renewal applications was the one-year period from October 1, 1988, to September 30, 1989, and Ms. Zika had not counted part-time employees and employees who left the Stations prior to the end of the reporting period. Moveover, there appeared to have been no reason for Mr. Stortz or Ms. Zika to have compared the hiring data in the Opposition with the data in the renewal applications; the time periods covered by the two submissions were different, the information sought by the Commission was different, and the former encompassed all hires including part-timers, whereas the latter did not. Ms. Zika's testimony that the discrepancy probably resulted from the two different questions being asked by the Commission is completely credible. Consequently, the failure to notice the discrepancy or to explain it in the Opposition is understandable. This simple oversight does not constitute a misrepresentation or lack of candor. *Kaye-Smith Enterprises, supra; Gary D. Terrell*, 59 RR 2d 1452, 1454 (Rev. Bd. 1985).

B. Outreach Efforts and Recruitment Program

230. The findings establish that the Church was lacking in candor when describing portions of the Stations' minority recruitment program in the 1989 EEO Program contained in their renewal applications. Specifically, the Church described the Stations' EEO recruitment program, in pertinent part, as follows:

> [1] When vacancies occur, it is the policy of KFUO and KFUO-FM to seek out qualified minority and female applicants. [2] We deal only with employment services, including state employment agencies, which refer job candidates without regard to their race, color, religion, national origin or sex. [3] We contact the various employment services and actively seek female and minority referrals and we specifically request them to provide us with qualified female and minority referrals. [4] See sample reply form attached.

As will be shown below, these statements were highly misleading.

231. The first sentence of the quoted paragraph clearly connoted that it was the Stations' usual policy and practice to seek out qualified minorities on a regular and systematic basis whenever vacancies occurred. However, the record reflects that this was not the case. On the contrary, as discussed earlier, the Stations' minority recruitment efforts were sporadic, irregular, and inconsistent. The Stations certainly did not affirmatively seek out minority applicants as a matter of routine, or on a regular or systematic basis, as implied in their applications. This sentence failed to provide the Commission with a complete and fully informative depiction of the Stations' License Term minority recruitment efforts and, therefore, lacked candor. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983).

232. The Church argues that this sentence was literally true because it did *not* state that the Stations sought out minorities "for each job opening throughout the License Term." (Church's Proposed Findings and Conclusions, at p. 134, emphasis omitted.) This argument is without merit. Put simply, it completely ignores the plain meaning of the language contained in the Stations' EEO Program, and the obvious implication of that language.

233. The second sentence of the quoted paragraph is also inaccurate. The only employment service which the Stations utilized during the License Term was the Lutheran Employment Project of St. Louis. Even then, it was not utilized until the final year of the License Term. Yet the Church used the plural word "services" in this sentence. Further, the record does not reflect that the Stations ever dealt with, or sought referrals from, state employment agencies. This sentence exaggerated the Stations' efforts and, once again, was not fully informative.

234. The third and fourth sentences of the quoted paragraph are the most misleading. As discussed in the findings, the third sentence was added to the EEO Program by Mr. Stortz because the Stations "generally" publicized openings and had sent recruitment letters in July 1989 to 10 local universities and personnel agencies. However, what the Church did not reveal was that the various employment services were contacted on only one occasion, that such contact was not made with respect to any specific job opening, and that the Stations never again communicated with those services in connection with the nine full-time or five part-time positions they filled during the remainder of the License Term. Mr. Stortz was in a unique position to know these facts inasmuch as he was the Operations Manager of the Stations during the entire License Term, and was given the responsibility for the day-to-day operation of the FM station in July 1989, after Mr. Lauher left. Those responsibilities included sending out notices of job openings and notifying job sources of the FM stations' EEO policies. As a result, he had direct knowledge that the representations contained in this sentence were misleading. The fourth sentence only compounded the deceptive nature of the third sentence because it purported to provide evidence of the Stations' contacts. Thus, the portrayal of key aspects of the Stations' minority recruitment program was not totally accurate, and significant information which could have illuminated the Stations' program was omitted. This is the essence of lack of candor. *Fox River, supra.*

235. The Church maintains that a conclusion that language in an EEO Program, in and of itself, could constitute a misrepresentation or lack of candor is unprecedented, and that the Commission has never previously suggested that a licensee's failure to live up to its EEO program could raise misrepresentation or lack of candor questions. (Church's Reply Findings and Conclusions, at p. 27.) This argument is rejected for the simple reason that the *HDO* itself, at paragraph 28, raised such questions about the minority recruitment representations made by the Church in its renewal applications. The possibility that adverse conclusions could be reached as a

consequence of statements made by the Church in the Stations' EEO Program should, therefore, come as no surprise.

236. The Church further contends that no misrepresentation or lack of candor can be found because the Form 396 is unclear as to whether its questions cover the preceding or upcoming license term. (Church's Reply Findings and Conclusions, at pp. 27-28, 29-30.) This contention is irrelevant. The language used in the pertinent paragraph of the Stations' 1989 EEO Program, on its face, speaks in terms of what the Stations did in the past and were continuing to do as of the date of filing in connection with their recruitment of minorities. That language was misleading in that it omitted significant information. If the purpose of the Church's language was to speak only in terms of then-current (*i.e.*, July to September 1989) or future practice, then the paragraph under consideration should have contained some language explaining that fact. It did not. Moreover, it is significant to note that the practices referred to in the third and fourth sentences of the quoted paragraph were no longer being used by the Stations in late September 1989, when their renewal applications were filed. In other words, they were not the then-current practices, as Mr. Stortz well knew, yet they were cited by the Church. Even assuming that the Commission's forms were ambiguous, the Church's representations were not.

237. The Church also alleges that there was no intent to deceive and that no misrepresentation or lack of candor may be found without such intent. (Church's Reply Findings and Conclusions, at pp. 21-22, 28-29.) However, an intent to deceive may be found under the circumstances of this case. As noted above, Mr. Stortz was the Operations Manager of the Stations throughout the License Term, and was responsible for the daily management of the FM station beginning in July 1989. In those capacities, Mr. Stortz was in a singular position to know all of the facts pertaining to the actual manner in which the Stations implemented their EEO program, including their recruitment efforts. Specifically, Mr. Stortz knew that the Stations did not seek out qualified minority job applicants on anything resembling a regular or systematic basis. He knew that employment "services" (plural) and state employment agencies were not used as referral sources. And he knew that the 10 local universities and personnel agencies which had received recruitment letters were never contacted while he was in charge of the FM station. Yet Mr. Stortz allowed the misleading and incomplete information referred to above to be filed with the Commission. In fact, the most misleading statement of all, the third sentence, was even accompanied by a "sample" reply form in a transparent attempt to support the Stations' assertions. Mr. Stortz testified that he had no intention of misleading the Commission by attaching the sample. But what else could his intention have been, other than to create an erroneous impression of the Stations' actual recruitment efforts. It is abundantly clear that the Church, through Mr. Stortz, was fully aware of all the facts, but the renewal applications only revealed selected portions of those facts, *i.e.*, those portions which were entirely favorable to the Church. Consequently, it must be concluded that there was a willful intent to mislead.[24]

238. The evidence further establishes that there was, as well, a motive to mislead. Mr. Stortz had knowledge of Mr. Lauher's memorandums to Reverend Devantier concerning the FM station's EEO compliance problems. Mr. Stortz had received copies of those documents. Because of this, Mr. Stortz knew that failure to take corrective action "could create significant jeopordy [sic] in license retention"; that "[i]f the concerns are not addressed quickly, the worst possible consequence is loss of license"; that EEO compliance was "the most critical area in license renewal"; that "'[n]umbers do not work anymore'"; that "'[t]he question is: Is the station following its own plan?'"; that "'broadcasters are held to a higher EEO standard than most other private employers'"; that "'the FCC reviews station [EEO] compliance as part of the . . . renewal process'"; that Mr. Lauher discovered that "we are operating in violation of our own [EEO] policy as currently on file"; and that Mr. Lauher had "reason to believe this applies to the AM operation as well as the FM operation." Mr. Stortz also knew that, after Mr. Lauher's departure, many of the EEO reforms initiated by his predecessor were not implemented or utilized, and the Stations' EEO efforts were still deficient. As a result, it is reasonable to conclude that had the Church given the Commission a complete and accurate description of the Stations' recruitment efforts, questions were likely to have been raised, as Mr. Lauher predicted, concerning their renewal applications. By giving only a partial and favorable picture, the Church hoped to avoid careful scrutiny.

C. The Arrangement with Concordia Seminary

239. The *HDO* questioned the silence of the renewal applications regarding the arrangement with Concordia Seminary, and the Bureau concludes that it should have been reported, stating that "the Commission could not have guessed that recruitment was affected by an arrangement for the employment of Concordia Seminary students and their spouses." (Bureau's Proposed Findings and Conclusions, at p. 58.) The findings establish that there was no misrepresentation or lack of candor in connection with the Seminary.

240. The record reveals that the arrangement with the Seminary was a decades-old work/study training program. Students and their spouses were paid to work at the Stations part-time, only 6 to 12 hours a week, while being trained in the use of radio as a medium in the Church's mission and ministry. The FCC Form 396 did not request information on whether a broadcast facility was being used for training purposes, unless the training program was specially designed to train women and minorities. Even then, the provision of information on such a program was optional. Further, the Commission had previously considered the EEO programs of a number of licensees that were affiliated with a school and that either utilized their station

[24] Even assuming, *arguendo*, that Mr. Stortz did not have direct knowledge of all of these matters, it must be concluded that, as the individual responsible for the daily management of the FM station during the critical time period, he should have known these things. That being the case, his failure to ascertain the true, complete and accurate facts pertaining to the Stations' recruitment program, and the failure of the Church to report all such facts in the Stations' renewal applications, constituted gross negligence and wanton carelessness, which are the functional equivalents of an intent to deceive. *See Golden Broadcasting Systems, Inc.*, 68 FCC 2d 1099, 1106 (1978).

to train students, or utilized the school as a favored source for station hiring. In none of these cases had the Commission questioned the propriety of such an arrangement. *See Seattle Public Schools*, 4 FCC Rcd 625, 632 (Rev. Bd. 1989); *Catawba Valley Broadcasting Company, Inc.*, 3 FCC Rcd 1913, 1916 (1988); *University of North Carolina at Chapel Hill*, 79 FCC 2d 248, 255 (1980). The Church, therefore, had no reason to believe that information about the training program at the Seminary would be of interest to the Commission.

241. Further, because the EEO Program included with the renewal applications discussed only full-time employees, there would have been no reason for the Church to have mentioned the arrangement with the Seminary. Indeed, the FCC Form 396 Filing Instructions did not request information on part-time hires. Rather, the Instructions indicated that it was only necessary to complete and file the form if the Stations employed five or more *full-time* employees. Given the focus of the Form 396 on full-time employees, it is understandable that the Church did not discuss the arrangement with the Seminary. Moreover, as soon as the Commission requested, as part of its expanded inquiry, information beyond the raw employment data contained in the renewal applications, the Church provided information about its training program.

D. Knowledge of Lutheran Doctrine or Classical Music

242. **"Qualified" Minorities and Females.** The EEO Program contained in the Church's renewal applications stated that the Stations sought out "qualified minority and female applicants," and requested referral sources to provide them with "qualified female and minority referrals." The *HDO* questioned the failure of the renewal applications to reveal that the Stations had a requirement that employees have Lutheran or classical music training in order to qualify for certain positions. The Bureau concludes that these requirements should have been specifically disclosed in the renewal applications because the use of the modifier "qualified" could not reasonably have alerted the Commission that the Stations' recruitment efforts were limited by employment criteria such as Lutheran training or knowledge of classical music. (Bureau's Proposed Findings and Conclusions, at p. 58.)

243. The findings establish that there was no misrepresentation or lack of candor with respect to the use of the phrases in question in the renewal applications. The FCC Form 396 Filing Instructions state: "Broadcast station licensees are required to afford equal opportunity to all *qualified persons* . . ." (Church Ex. 9, p. 1, emphasis added.) Similarly, the Form 396 itself, under the heading "Recruitment" states: "A broadcast station must make efforts to attract *qualified minority and women applicants* for all types of jobs at the station whenever vacancies occur." (*Id.* at p. 3, emphasis added.) Throughout the years, the Commission's Model EEO Programs have contained similar language. *E.g., Nondiscrimination in Employment Practices*, 60 FCC 2d 226, 249-50 (1976) ("It is our policy to provide equal employment opportunity to all *qualified individuals*"; "We attempt to maintain systematic communication . . . with a variety of minority and women [sic] organizations to encourage the referral of *qualified minority and female applicants*"; emphasis added); *Equal Employment Opportunity*, 49 RR 2d 1295, 1299-1300 (1981) ("It will be our policy to provide equal employment opportunity to all *qualified individuals*"; "We will attempt to maintain systematic communication . . . with a variety of minority and women's organizations to encourage the referral of *qualified minority and female applicants*"; emphasis added.)

244. However, nowhere in the Filing Instructions, the Form 396, or the Commission's Model EEO Programs are the phrases "qualified individuals," "qualified persons," "qualified minority and female applicants," or "qualified minority and women applicants" defined. Likewise, nowhere in the Filing Instructions, the Form 396, or the Model EEO Programs does the Commission require a licensee to provide a detailed explanation, or indeed any explanation, of the criteria that the licensee uses to determine whether minority or female applicants are "qualified." Under these circumstances, the Church can hardly be faulted for following the language of the Commission's own forms and models, or for failing to include information not requested by the Filing Instructions or the Form 396. In this vein, it may be argued that job requirements such as a bachelor's or postgraduate degree may have a disproportionate impact upon minority job applicants. But the Form 396 has never requested from licensees information on these requirements, nor has the Commission ever apparently found the failure to disclose such requirements to be an issue. There is no reason to treat the Church's religious and classical music criteria any differently.

245. Moreover, the Church disclosed these job qualification criteria at the first possible opportunity after its EEO program was questioned, and there is no evidence in the record that the Church sought to conceal that information by not including it in the renewal applications. Supposing that the Church had believed that the employment criteria were requested by the renewal applications and had wanted to conceal them, there would have been no reason for the Church to have then revealed that information at the very first opportunity. *Dixie Broadcasting, Inc.*, 8 FCC Rcd 4386, 4403 (ALJ 1993); *Emerald Broadcasting Co.*, 30 FCC 2d 879, 883 (1971). There is no hint of misrepresentation or lack of candor in the Church's actions.

246. **"Requirement" for Knowledge of Classical Music.** The findings establish that the Church was lacking in candor when it stated in its February 23, 1990, Opposition to the NAACP's Petition to Deny, and again in its September 21, 1992, Motion to Strike and Reply to Comments, that classical music knowledge was a requirement for a position as a salesperson at the FM station. While the Opposition was drafted by Marcia A. Cranberg, the Stations' former legal counsel, it was reviewed by Mr. Stortz, who provided an affidavit concerning the truth of the facts asserted therein.

247. The language in the Opposition concerning the classical music knowledge requirement was derived from a number of conversations and written communications between Ms. Cranberg and Mr. Stortz. Ms. Cranberg had asked Mr. Stortz whether there were any particular positions at the Stations that required any specialized skills or background. Mr. Stortz responded that there were, and the two discussed them and the reasons why specialized skills were necessary. Mr. Stortz sent a memorandum to Ms. Cranberg in which he stated that: "KFUO-FM's format is 'Classical,' with many of it's [sic] positions *requiring* a knowledge of classical music . . ." (Emphasis added.) Ms. Cranberg used the representation concerning the requirement for specialized skills as an integral part of the Church's argument urging the Commission to employ alternative data to the labor force statistics in judging the results of the Stations' recruitment efforts. The law firm for

which Ms. Cranberg worked had apparently used a similar argument successfully in an earlier EEO case involving another classical music broadcast station client.

248. The record reflects, however, that classical music knowledge, although desirable, was not a requirement for a sales position at the FM station. On the contrary, giving the Church the benefit of all possible doubts, only 8 of the 15 individuals hired for the position of Sales Worker during the License Term had some classical music background or experience. In other words, 7 of the 15, or nearly half, did not.

249. As Operations Manager for the Stations during the entire License Term, Mr. Stortz knew that knowledge of classical music was not an absolute requirement for the position of salesperson at the FM station. Indeed, he admitted this in an affidavit appended to the Church's December 28, 1992, Reply to FCC Letter of Inquiry. In his affidavit, Mr. Stortz claimed, in essence, that when he advised the Commission that knowledge of classical music was a requirement, he did so because he was not an attorney and was "not accustomed to providing the level of detail and precision with which attorneys, and those who deal with them frequently, may be more familiar." He denied any intention to mislead.

250. But he did mislead, and it must be concluded that his actions were deliberate. Thus, an individual does not have to be an attorney, or deal with attorneys frequently, to know the usual and customary meaning of the words "required," "requiring," or "requirement."[25] Either something is a requirement or it is not. Classical music knowledge was not a job requirement, and Mr. Stortz knew it. Yet he permitted the Church to represent to the Commission, on two occasions, that it was. By concealing the complete facts, by failing to be fully forthcoming and informative, the Church lacked candor. *Fox River, supra*.[26]

251. The Church maintains that this dispute is a matter of semantics, that there was no motive to deceive the Commission through the use of the word "required," and that there was no motive for Mr. Stortz to have used the word "requirement" rather than the word "preferred." (Church's Reply Findings and Conclusions, at pp. 31-32.) This is erroneous. Initially, it must be noted that "required" and "requirement" were not the only questionable words used in the Church's Opposition. The Church also represented that the jobs in question "can *only* be filled" by persons with expertise in classical music, and that certain employees "*must* have" specialized skills. (Emphasis added.) Consequently, this issue involves more than simple semantics. Further, as demonstrated earlier, Mr. Stortz, a recipient of Mr. Lauher's memorandums, knew that the Stations' EEO efforts were deficient and knew that a Commission review of those efforts could place the Stations' licenses in jeopardy. By representing that classical music knowledge was a requirement for sales positions, and by maintaining that few minorities had the required expertise, the Church was attempting to show that the labor pool from which it could draw qualified minorities was extremely small, and that the Church's "minority employment record must be considered in that context." Use of words such as "preferred" or "preference" would not have conveyed the same meaning or carried nearly the same weight, and would have significantly weakened the Church's position.[27]

III. Sanctions

A. Issue 1 -- EEO Violations

252. It has been concluded that the Stations violated the Commission's EEO rules and policies by improperly giving preferential hiring treatment to individuals with knowledge of LCMS or Lutheran doctrine, and to active members of Christian or LCMS congregations, for positions which were not reasonably connected with the espousal of the Church's religious views. Further, the Stations were not substantially compliant with the EEO rules and policies during the period from August 3, 1987, to the end of the License Term.

253. These deficiencies are sufficiently severe so as to warrant the imposition of EEO reporting conditions. The reporting conditions will afford the Stations the opportunity to design and put into practice an EEO program which is fully consistent with all aspects of the Commission's rules and policies. They will also enable the Commission to review the Stations' EEO program periodically to ensure that it is being utilized on a consistent, continuing, and systematic basis. The necessity for the imposition of reporting conditions is manifested by the fact that, throughout the License Term, the Stations' former legal counsel kept the Stations apprized of developments in the Commission's EEO rules and policies, often emphasizing the seriousness with which the Commission viewed EEO matters. However, with the exception of Mr. Lauher, there is no evidence that any management-level employee of the Stations ever heeded former counsel's advice and admonishments. Therefore, there appears to be a need for a formal mechanism to monitor the Stations' EEO compliance efforts.

254. Contrary to the arguments of the NAACP and the Bureau, denial of the renewal applications would not be appropriate under the circumstances of this case. There is not one scintilla of evidence that the Stations intentionally discriminated against minorities. On the contrary, during the period between February 1, 1983, and August 3, 1987, the Stations hired 19 full-time employees, of which 3 were African American. As a result, 15.8% of the full-time hires during this period were minorities, a figure which exceeded 100% of parity. Similarly, during the period from August 3, 1987, to January 2, 1990, the date the Petition to Deny was filed, the Stations hired 22 full-time employees, of which 2 were minorities (1 Hispanic and 1 African American). Further, one of those minorities was hired for

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[25] The American Heritage Dictionary (New College Ed. 1976), defines "requirement" as: "1. That which is required; something needed. 2. Something obligatory; a prerequisite."

[26] There is no evidence indicating that Ms. Cranberg, prior to the preparation of the Church's December 28, 1992, Reply, knew that the FM station hired individuals without classical music knowledge for Sales Worker positions.

[27] The American Heritage Dictionary, *supra*, defines "prefer" as: "1. To select in preference to another or others; value more highly; like better." "Preference" is defined as: "1.a. The selecting of someone or something over another or others. . . . 2. The state of being better liked or more valued. . . . 4. The granting of precedence or advantage to one over all others . . ."

a Top Four position. Thus, 9.1% of the full-time hires during this period were minorities, a figure which exceeded the Commission's 50% of parity guideline.

255. Moreover, the Stations, through Mr. Lauher, did conduct a review of their EEO efforts on their own initiative and without prompting or threat from either the Commission or the NAACP. The Stations also made a genuine and good-faith attempt to begin to correct the deficiencies found during that review. In addition, there is no evidence that anyone at the Stations or the Church attempted to impede either the review or the corrective measures which were initiated. Unfortunately, no one continued the work Mr. Lauher had begun. The imposition of reporting conditions should cause the Stations to complete their EEO reform efforts.

256. Finally, the Stations' EEO derelictions do not warrant non-renewal of their licenses because the imposition of such a draconian sanction would be contrary to all precedents in which the Commission has even remotely considered similar factual situations. *See, e.g., United Communications Corp.*, 54 RR 2d 22 (1983) (AM license renewed without reporting conditions but licensee asked to file a revised EEO program where no minorities were employed or hired during the license term and licensee failed to seek referrals from any minority sources); *Auburn Broadcasting Co.*, 57 RR 2d 1427 (1985) (AM and FM station licenses renewed with reporting conditions where licensee failed to contact minority referral sources or to hire minorities in parity with the local labor force, but had hired some minority employees during the license term); *National Capital Christian Broadcasting, Inc., supra* (television license renewed with reporting conditions where licensee made few, if any, efforts to contact minority referral sources, failed to monitor the results of its EEO program, omitted information from 2 sections of the EEO program filed with the FCC, but hired 2 minorities out of 18 hires during the last 12 months of the license term); *Letter to Allan W. Roberts*, 4 FCC Rcd 3463 (1989) (FM license renewed with reporting conditions where licensee had contacted a minority referral source only once during its ownership of the station without mentioning any specific job opening, failed to maintain any records to allow evaluation of the program, and had no minorities on the station's staff); *Applications of Certain Broadcast Stations Serving Communities in the State of Texas*, 4 FCC Rcd 6685, 6687 (1989) (television license renewed with reporting conditions where licensee only contacted a single minority referral source in the last year of the license term and failed to evaluate its EEO program until the end of the license term, but hired 2 minority employees out of 17 hires during the last 2 years of the license term); *Letter to Pegram Harrison*, 4 FCC Rcd 8255 (1989) (AM and FM licenses renewed for a full term and $18,000 forfeiture and reporting conditions imposed where licensee failed to contact minority recruitment sources for specific job openings, failed to evaluate its EEO program, hired only 1 minority in filling 53 job openings despite the fact that 10.5% of the local labor force was minority, and that one minority employee left after only 6 weeks); *Letter to Kerby Confer*, 5 FCC Rcd 579 (1990) (FM license renewed for a full term and $10,000 forfeiture and reporting conditions imposed where licensee contacted no minority referral sources until the end of the license term, failed to evaluate its EEO program, and had only 1 minority applicant for 11 job openings despite the fact that 51.1% of the local labor force was African American); *Letter to John P. Healy*, 5 FCC Rcd 3745 (1990) (FM license renewed for a full term and $10,000 forfeiture and reporting conditions imposed where licensee used no minority recruitment sources, failed to evaluate its EEO program, and had no minority applicants despite 32 upper-level job openings); *Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area*, 5 FCC Rcd 4893, 4895 (1990) (FM license renewed with reporting conditions where licensee made no specific efforts to recruit minorities during the license term, did not evaluate the effectiveness of its EEO program, and hired no African Americans, the dominant minority in the labor force, for any of the 32 openings during the last 2 years of the license term); *Winfas, Inc., supra* at 4902-03 (where FM licensee argued that station's country and western format made it difficult to attract minority applicants, license renewed with reporting conditions where licensee used no minority referral sources prior to the filing of its renewal application, interviewed only 7 minorities for 31 openings over a 3-year period, and failed to evaluate its EEO program); *Application for Renewal of License of Certain Broadcast Stations Serving Melbourne, Florida and Other Communities in the Florida Area*, 5 FCC Rcd 6738, 6739 (1990), *recon. denied* 7 FCC Rcd 6045 (1992), 8 FCC Rcd 4223 (1993), *appeal pending* No. 92-1546 (D.C. Cir.) (AM and FM licenses renewed with reporting conditions where licensee contacted no minority referral sources, had minority applicants apply for only 4 of 36 job openings, and failed to evaluate its EEO program); *Certain Broadcast Stations Serving Communities in the State of Arkansas*, 6 FCC Rcd 4938, 4939-40 (1991) (Commission noted that "it is apparent that the licensee in fact engages in significant efforts to recruit and hire minorities" and granted an unconditional license renewal where 6 of 7 Annual Employment Reports filed by licensee were inaccurate, the licensee contacted minority-specific referral sources for only 21 of 70 job openings, and only 4 of 70 hires (5.7%) were minority in a market with a 17.3% minority labor force); *Application of Group Six Communications, Inc.*, 7 FCC Rcd 1815, 1816 (1992) (FM license renewed for a full term and $20,000 forfeiture and reporting conditions imposed where licensee "rarely activated its EEO program," reported no minority applicants, interviewees, or hires for any of its 26 job openings, failed to keep records necessary to assess its program, and failed to modify its EEO program until just prior to filing its renewal application); *Radio Seaway, Inc.*, 7 FCC Rcd 5965, 5968 (1992) (FM license renewed with reporting conditions where licensee failed to contact outside referral sources for 20 of 31 job openings, and failed to recruit for any job openings prior to the reporting year that preceded the filing of its renewal application); *Goodrich Broadcasting, Inc.*, 7 FCC Rcd 6655, 6656-57 (1992) (AM and FM licenses renewed with reporting conditions where licensee failed to keep any applicant flow data, thereby leaving it unable to determine the referral sources contacted for 29 of 42 job openings, failed to evaluate its EEO program, and appeared to have had no minority applicants in the interview pools for 35 of 38 job openings).

B. Issue 2 -- Lack of Candor

257. It has been concluded that the Church lacked candor, in violation of Section 73.1015 of the Rules, in describing the Stations' minority recruitment program in its 1989 renewal applications, and in informing the Commission that knowledge of classical music was a require-

ment for the position of salesperson at the FM station. This lack of candor warrants the imposition of a forfeiture in the amount of $50,000.

258. Prior to 1986, the only appropriate sanction for a lack of candor such as that demonstrated in this case would have been denial of license renewal. However, in 1986 the Commission added to its rules Section 73.1015. It did so in order to allow greater flexibility to level sanctions short of disqualification. *Policy Regarding Character Qualifications in Broadcast Licensing,* 102 FCC 2d 1179, 1233-34 (1986); *see also Proposals to Reform the Commission's Comparative Hearing Process,* 6 FCC Rcd 157, 164 (para. 51) (1990), and Section 1.229(f) of the Commission's Rules. In this connection, the Commission has stated that its focus in assessing the sanction due a licensee for the violation of its rules, including Section 73.1015, is the predictive value such misconduct has with respect to a licensee's future truthfulness and reliability. In making this predictive judgment, the Commission considers the willfulness of the misconduct, its frequency, and the licensee's overall record of compliance with the Commission's rules and policies. *Policy Regarding Character Qualifications, supra* at 1225-29.

259. Both the NAACP and the Bureau maintain that the Church's misconduct warrants the denial of the Stations' renewal applications. Their position must be rejected. While the Church's lack of candor is a serious matter, it is not sufficiently egregious so as to justify the "ultimate sanction" of denial of renewal. This is so because the misconduct was largely the product of the actions of one individual, Mr. Stortz. There is no indication that Reverend Devantier, the Stations' CEO during the License Term, or Reverend Dr. Ralph Bohlmann, the President of the Church during the License Term, had any prior knowledge of the misconduct. Similarly, there was no evidence that Reverend Devantier or Reverend Dr. Bohlmann participated in the misconduct. The testimony of Reverend Devantier also reveals that he was genuinely embarrassed and troubled by the situation in which the Church found itself. He expressed sincere contrition, and his testimony in this regard was entirely credible. For his part, Mr. Stortz testified truthfully at the hearing, even when that testimony was likely to have had an adverse effect on the Church's case. It is highly unlikely, therefore, that the Church will deal with the Commission in the future in anything less than a fully forthright, candid, and truthful manner.

260. Moreover, the Church has been a Commission licensee for more than 70 years. Station KFUO(AM) went on the air in December 1924, and its first license was issued to Concordia Seminary in January 1925. Over the course of that 70-year period, the Stations have had a spotless record with the Commission. With the exception of this proceeding, the Stations have never been cited for any violations of the Commission's rules or policies. Thus, the Church's overall record of compliance has been exemplary. Viewed in this light, the Church's misconduct may be seen as an isolated occurrence, an aberration, confined to a single Commission investigation.

261. Under all of these circumstances, no useful purpose would be served by denying the Church's renewal applications. However, as noted above, the Church's misconduct was serious and warrants the imposition of a forfeiture in the amount of $50,000 for its willful and repeated violation of Section 73.1015 of the Commission's Rules. *Dixie Broadcasting, supra* at 4404.

MOTION TO ENLARGE ISSUES

262. On June 20, 1994, the very day the hearing began, the NAACP filed a Motion to Enlarge, and for Injunctive Relief.[28] The NAACP seeks, *inter alia,* the addition of the following issues to this proceeding:

> (3) To determine whether The Lutheran Church/Missouri Synod abused the Commission's processes by using a person under its control to obtain, by trickery and under false pretenses, the attorney work product of the NAACP's attorney, which work product constitutes virtually the NAACP's entire trial strategy; and
>
> (4) To determine whether The Lutheran Church/Missouri Synod abused the Commission's processes by interfering with an NAACP witness and improperly attempting to induce such witness not to provide testimony in this proceeding.

For the reasons which follow, the NAACP's Motion will be denied.[29]

I. Requested Issue 3 -- Alleged "Theft" of Attorney Work Product

263. The NAACP argues that the Church used Mr. Lauher to obtain information regarding the NAACP's trial strategy, and that this constituted a "theft" of the work product of the NAACP's counsel. In support, the NAACP recites the following facts. The NAACP retained the services of Michael C. Blanton, a third-year law student, to conduct an interview of Mr. Lauher. Mr. Blanton called Mr. Lauher on or about May 19, 1994, and told Mr. Lauher that he worked for the NAACP's counsel and that the NAACP was "looking for witnesses to testify and give Declarations on behalf of the NAACP in its lawsuit against [the Church]." Mr. Lauher agreed to the interview, which took place on May 23, 1994. The interview was tape-recorded by Mr. Lauher after obtaining Mr. Blanton's permission. Mr. Blanton asked Mr. Lauher approximately 20 questions about the two memorandums he had written to Reverend Devantier. The questions had been prepared by the NAACP's counsel. After reviewing a lengthy memoran-

[28] An Opposition to Motion to Enlarge and Request for Injunctive Relief was filed by the Church on July 8, 1994; Comments on Motion to Enlarge and for Injunctive Relief were filed by the Bureau on July 8, 1994; a Motion for Acceptance of Reply *Nunc Pro Tunc* was filed by the NAACP on July 25, 1994; a Reply to Opposition to Motion to Enlarge was filed by the NAACP on July 25, 1994; and Comments on NAACP's "Motion for Acceptance of Reply *Nunc Pro Tunc*" was filed by the Church on August 3, 1994. In its Motion for Acceptance, the NAACP requests that its Reply, which was filed one working day late, be accepted *nunc pro tunc*. Although the Church takes umbrage at the tone and certain language contained in the Reply, it does not oppose the acceptance of that pleading. Therefore, the Reply will be accepted.

[29] Those portions of the NAACP's motion which requested injunctive relief were taken up and ruled on at the June 20, 1994, hearing session. *See* Tr. 79-89, 93-100. Consequently, no further consideration will be given to those matters.

dum from Mr. Blanton relating to the interview, the NAACP's counsel determined that Mr. Lauher "would not be a particularly useful witness." On the date the direct case exhibits were exchanged, the NAACP's counsel learned that Mr. Lauher was going to appear as a witness for the Church, and that Mr. Lauher's declaration had been executed on May 21, 1994, two days prior to the interview with Mr. Blanton. Mr. Lauher never informed Mr. Blanton that he had already given a declaration to the Church or that he would be a witness in their behalf. (Motion to Enlarge at pp. 2-5 and Annex 1.)

264. From this scenario, the NAACP alleges that Mr. Lauher was "in a difficult position" with the Church because he knew that his two memorandums "deeply incriminated" the Church. The NAACP maintains that Mr. Lauher was "in need of remaining in [the Church's] continued good graces" because he was "still in the market in the advertising business." The NAACP asserts that Mr. Lauher "evidently made a pact" with the Church pursuant to which he would renounce and repudiate his memorandums, interview with the NAACP, and "fraudulently pos[e] as a potential NAACP witness." The NAACP contends that Mr. Lauher was under the Church's control, "had to have" told the Church that he was meeting with Mr. Blanton, and made the tape recording "at [the Church's] direction." In this regard, the NAACP states that it would be "amazing" if Mr. Lauher did not give the Church a copy of the tape. In addition, the NAACP claims that the written direct case testimony of Mr. Stortz and Reverend Devantier show that the Church "must have had and used" Mr. Lauher's tape recording. Further, the NAACP avers that its "trial strategy" was "embedded" within its questions for Mr. Lauher, and that this incident constituted a "theft" of its attorney's work product. The NAACP also suggests that attorneys in the law firm of Fisher Wayland Cooper Leader & Zaragoza, the Church's counsel, may have been implicated in "what amounts to a conspiracy to obstruct justice." (Motion to Enlarge at pp. 2, 5-7, emphasis omitted.)

265. In its Opposition, the Church states that, in preparing for the hearing, Kathryn R. Schmeltzer and Barry H. Gottfried, two of the Church's counsel, talked with many individuals whom the Church believed had knowledge of the facts relevant to the hearing issues. One of the individuals interviewed was Mr. Lauher. When it came time to select witnesses for the hearing, the Church decided that Mr. Lauher's testimony would be useful. Consequently, Ms. Schmeltzer and Mr. Gottfried obtained a declaration from Mr. Lauher on May 21, 1994, for its direct case presentation. On that date, Mr. Lauher informed the Church's counsel for the first time that he had agreed to talk to a representative of the NAACP.

266. After obtaining Mr. Lauher's declaration, the Church's counsel contacted Mr. Lauher by telephone to determine his availability for the hearing. Mr. Lauher told the Church's counsel during that conversation that he had talked to the NAACP's representative. Mr. Lauher reported that he had been asked whether he had been fired from his job at KFUO-FM because of the memorandums he had written on the station's employment practices, and that he had told the NAACP's representative that his dismissal was not connected with those memorandums. Mr. Lauher mentioned that he had taped the interview. There was no further discussion of the NAACP's interview.

267. Mr. Lauher arrived in Washington, D.C., at about 9:30 p.m. on Sunday, June 19, 1994, approximately 12 hours before the beginning of the hearing. At a meeting with Ms. Schmeltzer and Mr. Gottfried that evening, Mr. Lauher provided them with a transcript of the interview with the NAACP. Both counsel "glanced over" the 10-page transcript, noted the "routine nature" of the questions and answers, but did not discuss the contents of the transcript with Mr. Lauher. No further attention was given to the transcript until the next morning, when counsel for the NAACP raised the matter at the commencement of the hearing. (Opposition to Motion to Enlarge at Ex. A, declaration under penalty of perjury of Mr. Gottfried.)

268. The requested issue will not be added to this proceeding. Section 1.229(d) of the Commission's Rules requires that petitions to enlarge the issues be supported by "affidavits of a person or persons having personal knowledge" of the facts alleged therein. The NAACP's motion fails in this regard. Specifically, its key factual allegations that Mr. Lauher was under the Church's control, that he tape-recorded the interview "at [the Church's] direction," that he "evidently made a pact" with the Church, the nature of that "pact," and that the tape recording was used in connection with the direct case testimony of Mr. Stortz and Reverend Devantier, are supported by nothing more than pure, unadulterated speculation, conjecture, innuendo, and surmise. It is well settled that issues will not be added on this basis. *E.g., Folkways Broadcasting Co., Inc.*, 33 FCC 2d 806, 811 (Rev. Bd. 1972); *West Central Ohio Broadcasters, Inc.*, 1 FCC 2d 1178 (Rev. Bd. 1965).

269. Moreover, the facts which were supported by sworn testimony at the hearing establish that Mr. Lauher was independent of the Church, and that there was no conspiracy to steal the work product of the NAACP's counsel or to obstruct justice. Thus, Mr. Lauher testified that he owned Station WRYT, Edwardsville, Illinois, and that his station did not do any business of any kind with the Church or the Stations. (Tr. 111-12.) Mr. Lauher testified that he was not a Lutheran. (Tr. 134.) Mr. Lauher testified that it was his idea to tape-record the interview with Mr. Blanton, and that no one at the Church suggested that he do so. (Tr. 127-28.) Mr. Lauher testified that he did not tell Mr. Stortz or Reverend Devantier that he had made the tape. (Tr. 131-32.) Mr. Lauher testified that he did not tell Mr. Blanton about the May 21, 1994, declaration he provided to the Church because "Mr. Blanton didn't ask" and "It didn't appear to be relevant at the time[.]" (Tr. 127.) Mr. Lauher testified that he personally prepared the transcript of the tape recording, that it was made at his own expense, and that Ms. Schmeltzer did not ask him to make the transcript. (Tr. 132-33.)

270. In addition, Mr. Stortz testified that, although he did not know of the Blanton-Lauher interview at the time of its occurrence, one of the Church's attorneys mentioned it to him prior to the time he signed his direct case testimony. However, the attorney did not tell Mr. Stortz what was said during the interview, and Mr. Stortz had never heard the tape recording or seen the transcript of that recording. (Tr. 460-63.) Similarly, Reverend Devantier testified that he had not heard the tape recording or seen the transcript of the Blanton-Lauher interview, and that neither the contents of the tape nor the transcript had been described to him. (Tr. 794.)

271. Further, while the Motion to Enlarge alleges the "theft" of attorney work product, the work product doctrine is not applicable under the circumstances surround-

ing this incident. This is so because the NAACP's questions to Mr. Lauher, a third-party, were not privileged. Mr. Lauher was neither a principal nor an agent of the NAACP; he was nothing more than a potential witness. No reasonable expectation of confidentiality attaches in such a situation. What occurred, therefore, was not the theft of attorney work product, but rather the voluntary disclosure by a third-party potential witness of his conversation with an NAACP representative, which conversation was tape-recorded with the NAACP's consent. Even assuming, *arguendo*, that the NAACP's questions to Mr. Lauher did reveal the NAACP's "trial strategy" and did constitute work product, any privilege which might have attached was waived when the questions were intentionally disclosed to an individual, such as Mr. Lauher, who was not a principal or an agent of the NAACP. Consequently, the NAACP interviewed Mr. Lauher, and asked its 20 questions, at its own peril. *See, generally, Data General Corporation v. Grumman Systems Support Corporation*, 139 F.R.D. 556 (D. Mass. 1991).

272. Finally, an analysis of the transcript of the Blanton-Lauher interview reveals that the NAACP's "trial strategy" could not possibly have been discerned from the questions Mr. Blanton asked Mr. Lauher. Indeed, nearly all of the questions Mr. Lauher was asked related to the two memorandums he wrote to Reverend Devantier, and the questions were both predictable and routine. Asking Mr. Lauher questions of that nature can hardly be described as disclosing the NAACP's "trial strategy."

II. Requested Issue 4 -- Alleged Witness Interference

273. In its February 23, 1990, Opposition to Petition to Deny and Response to Inquiry, the Church stated that Reverend Otis D. Woodard, a Lutheran lay minister who was the director of Lutheran North St. Louis Outreach, had referred several minority applicants to the Stations. In its Motion to Enlarge, the NAACP argues that the Church contacted Reverend Woodard, "an NAACP witness," and attempted to induce him not to testify in this proceeding. The NAACP maintains that these contacts constituted an abuse of process. In support, the NAACP relies on the following facts. Mr. Stortz called Reverend Woodard on the morning of June 15, 1994, and offered to let him make public service announcements on the Stations. According to Reverend Woodard, Mr. Stortz also "inferred" the possibility of a future job at the Stations. That same afternoon, Reverend Woodard executed a declaration to be used in the NAACP's rebuttal case in which he stated that the Stations never approached him as a referral source for minority applicants. On June 17, 1994, Reverend Woodard received a second call from Mr. Stortz. Mr. Stortz told Reverend Woodard that whoever had told him that the Church had mentioned him as a minority referral source had been misinformed, and that it had been his former wife, Katherine Woodard, who had been the Stations' minority referral source.

274. From these facts, the NAACP contends that Mr. Stortz's contacts, taken together, were improper. Specifically, the NAACP asserts that the first call constituted "a tangible inducement not to come forward to be a witness for the other side," and the second call was "an implication that if Rev. Woodard testified, he would be embarrassed with questions . . . about his former wife." (Motion to Enlarge at pp. 11-12, Annex 5, and Annex 6.)

275. In a declaration appended to the Church's Opposition, Mr. Stortz states that in February 1994 he received a letter from Reverend Woodard, whom he had met several times before, expressing an interest in working on a regular basis as on-air talent at the Stations. Mr. Stortz interviewed Reverend Woodard for an on-air job on March 1, 1994. Reverend Woodard stated during the interview that he wanted "to be part of the KFUO family," that he wanted to "retire" at the Stations, and that his interest was based on the fact that he was a life-long Lutheran. Reverend Woodard left his "General Resume." Mr. Stortz told Reverend Woodard that he would be considered for an on-air job at the Stations as openings occurred. Several weeks later, Mr. Stortz received a message that Reverend Woodard had called him. He returned the call, but was unable to reach Reverend Woodard. Later that day, Reverend Woodard's wife called Mr. Stortz. When Mr. Stortz told her that he had received a message earlier in the day that Reverend Woodard had called, Reverend Woodard's wife said that she was sure the call was about Reverend Woodard's desire to work at the Stations. In May 1994, Mr. Stortz received another call from Reverend Woodard asking if he would be interested in receiving an "air check tape." Mr. Stortz said he would be happy to have it and Reverend Woodard delivered the tape to him at the Stations.

276. On June 15, 1994, Mr. Stortz received a telephone message from Reverend Woodard asking him to call Reverend Woodard "immediately." Mr. Stortz called and was told by Reverend Woodard that the NAACP had contacted him to discuss the Stations. Reverend Woodard wanted to know what it was about. Mr. Stortz told Reverend Woodard that the NAACP had raised an EEO matter against the Stations. The next day, June 16, 1994, Mr. Stortz called Reverend Woodard to ask how the interview with the NAACP had gone. Reverend Woodard stated that the NAACP had asked about "some referral source" and that he did not know what was meant by that. During that call, Reverend Woodard again reminded Mr. Stortz that he wanted to work at KFUO and to "retire" at the Stations. He did not tell Mr. Stortz that he had given a statement to the NAACP, nor did Mr. Stortz ask whether he had done so.

277. On June 17, 1994, at about 3:00 p.m. Central Time, Mr. Stortz telephoned Reverend Woodard in reference to his "referral source" comment of the previous day. Mr. Stortz told Reverend Woodard that the Stations' records indicated that his Outreach Ministry had been used as an employment referral source, and that the records showed that the specific person talked to at the Outreach Ministry was Kathy Woodard. When asked, Reverend Woodard stated that Kathy Woodard was his ex-wife, and that it was quite possible that his ex-wife would have handled a referral contact without discussing it with him. Mr. Stortz and Reverend Woodard continued to converse, and Mr. Stortz told him that he would be glad to air public service announcements for his organization if Reverend Woodard would send them over. According to Mr. Stortz, "[t]his was hardly unusual, particularly given [Reverend] Woodard's prior appearances on KFUO to promote his organization and its needs." During the call, Reverend Woodard reminded Mr. Stortz once again of his desire to work and "retire" at the Stations, and Mr. Stortz reiterated his earlier statement that he would be considered for any on-air openings as they arose. Mr. Stortz again did not ask whether

Reverend Woodard had signed a statement for the NAACP, and Reverend Woodard did not tell him that he had done so.

278. At about 5:30 p.m. Central Time on June 17, 1994, subsequent to all of the conversations described above, Mr. Stortz learned for the first time that Reverend Woodard had in fact given a signed statement to the NAACP. Mr. Stortz had no further contacts with Reverend Woodard after that time. (Opposition to Motion to Enlarge at Ex. C.)

279. The issue requested will not be added. It is well established that the proponent of a motion to enlarge issues has the burden of coming forward with a *prima facie* showing in support of the requested issue. *Scott & Davis Enterprises*, 88 FCC 2d 1090 (Rev. Bd. 1982). The NAACP has failed to meet this standard. Put simply, no factual basis exists for the addition of Issue 4 since it does not appear that Mr. Stortz attempted to interfere with or improperly influence Reverend Woodard's testimony. Thus, Reverend Woodard's declarations do not state that Mr. Stortz made any reference in his telephone calls to the possibility of Reverend Woodard's testifying in this case. Similarly, those declarations do not state that Mr. Stortz attempted to dissuade Reverend Woodard from testifying, or that Mr. Stortz tried to influence his possible testimony.

280. Further, the declaration of Mr. Stortz indicates that it was Reverend Woodard, not Mr. Stortz, who first brought up the subject of employment at the Stations during their telephone calls. The NAACP had the opportunity to challenge this assertion in its Reply to the Church's Opposition by providing a further declaration from Reverend Woodard. However, it did not do so. Therefore, Mr. Stortz's account of these aspects of the telephone conversations will be credited. Moreover, even assuming that Mr. Stortz initially raised the subject, the fact that he and Reverend Woodard discussed employment at the Stations during the calls in question does not establish that Mr. Stortz was attempting to influence or interfere with Reverend Woodard's testimony. This is so because Reverend Woodard had applied for employment at the Stations, had interviewed with Mr. Stortz, had discussed the matter with Mr. Stortz in several previous telephone calls, and the Stations had Reverend Woodard's resume and air check tape on file.

281. Next, the NAACP has provided no support for its contention that Mr. Stortz impliedly threatened Reverend Woodard with embarrassing questions about his former wife. On the contrary, Reverend Woodard did not even state in his declarations that he inferred this from his second conversation with Mr. Stortz. Consequently, the NAACP's argument must be rejected since it is based on nothing more than sheer speculation. *Folkways Broadcasting, supra; West Central Ohio Broadcasters, supra.* Finally, Mr. Stortz's offer to broadcast public service announcements for Reverend Woodard's Outreach Ministry does not appear to have been unusual, particularly since Reverend Woodard had previously appeared on KFUO to promote his ministry. Once again, the NAACP had the opportunity in its Reply to provide a declaration from Reverend Woodard disputing these facts, but failed to do so. In this connection, the mere opinion of the NAACP as to the significance of the facts alleged in its Motion to Enlarge is not a sufficient basis for the addition of issues. *Erway Television Corp.*, 2 FCC 2d 1037 (Rev. Bd. 1966).

ULTIMATE CONCLUSION

282. In view of all of the foregoing, it is ultimately concluded that the public interest, convenience and necessity would be served by a grant of the Church's applications for renewal of the licenses of Stations KFUO(AM) and KFUO-FM, Clayton, Missouri. However, it is also ultimately concluded that the Church violated Sections 73.1015 and 73.2080 of the Commission's Rules. Consequently, the Church's renewal applications will be granted subject to EEO reporting conditions, and a forfeiture in the amount of $50,000 will be assessed against the Church.

Accordingly, IT IS ORDERED that the Motion for Acceptance of Reply *Nunc Pro Tunc*, filed by the NAACP on July 25, 1994, IS GRANTED, and the Reply to Opposition to Motion to Enlarge, filed by the NAACP on July 25, 1994, IS ACCEPTED.

IT IS FURTHER ORDERED that the Motion to Enlarge, and for Injunctive Relief, filed by the NAACP on June 20, 1994, IS DENIED.

IT IS FURTHER ORDERED that, unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules, the applications of The Lutheran Church-Missouri Synod, for the renewal of the licenses of Stations KFUO(AM) and KFUO-FM, Clayton, Missouri, ARE GRANTED subject to the EEO reporting conditions specified herein.[30]

IT IS FURTHER ORDERED that The Lutheran Church-Missouri Synod SHALL SUBMIT four reports containing the following information, the first report being due six months after this Initial Decision becomes final, and the second, third, and fourth reports being due at six-month intervals thereafter:

(a) a list of all persons hired as well as all persons who applied for each position filled (i) during the six months preceding the first report, and (ii) during the period between the first and second, second and third, and third and fourth reports, indicating their referral or recruitment source, job title, part-time or full-time status, FCC Form 395 classification, date of hire, sex and race or national origin;

(b) a list of all employees as of the most recent payroll period prior to each filing date, by job title with part-time or full-time status indicated (ranked from the highest paid to the lowest paid), FCC Form 395 classification, date of hire, sex and race or national origin;

[30] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d) of the Rules.

(c) a narrative statement detailing the Stations' efforts to recruit minorities for each position filled during the specified periods, including identification of sources used, and indicating whether any of the applicants declined actual offers of employment; and

(d) any additional information the licensee believes relevant regarding the Stations' EEO performance and efforts.

IT IS FURTHER ORDERED that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, this Initial Decision SHALL CONSTITUTE an Order of Forfeiture in the amount of $50,000.

IT IS FURTHER ORDERED that, within 30 days after the date this Initial Decision becomes final, The Lutheran Church-Missouri Synod SHALL PAY the full amount of the forfeiture by check or money order made payable to "Federal Communications Commission." The remittance should identify the payor, be marked "NAL Control No. FCC 94-23; NOF Control No. FCC 95D-11," and be sent to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, IL 60673-7482

FEDERAL COMMUNICATIONS COMMISSION

Arthur I. Steinberg
Administrative Law Judge

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Annual 1995 Access Tariff Filings

Pacific Bell and Nevada Bell
Petition Regardring Election
of 5.3 X-Factor for Application
Back to January 1, 1995

ERRATUM

Released: July 26, 1995

By the Chief, Tariff Division, Common Carrier Bureau:

1. On July 25, 1995, the Common Carrier Bureau issued a Memorandum Opinion and Order rejecting a waiver filed by Pacific Bell and Nevada Bell, but setting forth the conditions under which the Bureau would grant the requested relief.[1] That Order is hereby clarified in the manner described in the following paragraph.

2. In paragraph 22, the phrase "Pacific Bell and Nevada Bell MAY FILE revisions to their 1995 annual access tariffs by July 27, 1995 to become effective August 1, 1995" should be corrected to read "Pacific Bell and Nevada Bell MAY FILE revisions to their 1995 annual access tariffs to become effective August 1, 1995, on not less than one day's notice".

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Chief, Tariff Division
Common Carrier Bureau

[1] Annual 1995 Access Tariff Filings, Pacific Bell and Nevada Bell Petition Regarding Election of 5.3 X-Factor for Application Back to January 1, 1995, Memorandum Opinion and Order, DA 95-1648 (rel. July 25, 1995).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Annual 1995 Access Tariff Filings

Petitions Regarding Election
of 5.3 X-Factor for Application
Back to January 1, 1995

Rochester Telephone Corp. and
Frontier Communications of Iowa, Inc. and
Frontier Communications of Minnesota, Inc.

Lincoln Telephone and Telegraph Company

ERRATUM

Released: July 27, 1995

By the Chief, Tariff Division, Common Carrier Bureau:

1. On July 26, 1995, the Common Carrier Bureau issued a Memorandum Opinion and Order rejecting waivers filed by the above-captioned local exchange carriers, but setting forth the conditions under which the Bureau would grant the requested relief.[1] That Order is hereby clarified in the manner described in the following paragraphs.

2. In paragraph 22, the term "$797,918" should be corrected to read "$767,918".

3. In paragraph 23, the term "$797,918" should be corrected to read "$767,918".

4. In paragraph 26, the phrase "$797,918 reduction" should be corrected to read "$767,918 reduction"; the phrase "$797,918 calculated sharing amount" should be corrected to read "$767,918 calculated sharing amount"; and the phrase "to yield $870,449" should be corrected to read "to yield $837,722".

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Chief, Tariff Division
Common Carrier Bureau

[1] Annual 1995 Access Tariff Filings, Rochester Telephone Corp. and Frontier Communications of Iowa, Inc. and Frontier Communications of Minnesota, Inc., and Lincoln Telephone and Telegraph Company, Memorandum Opinion and Order, DA 95-1667 (rel. July 26, 1995).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-81

In the Matter of

GTE Telephone Operating Companies Transmittal Nos. 909, 918

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: July 28, 1995; Released: July 28, 1995

By the Chief, Common Carrier Bureau:

1. On April 22, 1994, GTE Telephone Operating Companies (GTOC), on behalf of the General Telephone Company of California (GTECA), filed Transmittal No. 873 to establish the rates, terms, and conditions governing GTECA's provision of video channel service to Apollo CableVision, Inc. (Apollo), a cable company providing cable television service in Cerritos, California. On that same day, GTECA also filed Transmittal No. 874 to provide video channel service to an affiliated company, GTE Service Corporation (Service Corp.). Prior to that time, GTECA had been providing video channel service to both Apollo and Service Corp. on a trial basis under a five-year authorization granted in 1988, pursuant to Section 214 of the Communications Act of 1934 as amended (Act).[1] That authorization permitted GTECA to construct and operate the facilities necessary to provide video channel service. The Commission also had granted GTECA a five-year waiver of the cable-telephone cross-ownership ban[2] so that it could provide video programming to end users in Cerritos. GTECA stated that it submitted Transmittal 874 to enable Service Corp. to continue providing cable service to Cerritos subscribers after the waiver expired on July 17, 1994.[3]

2. On July 14, 1994, the Common Carrier Bureau (Bureau) suspended Transmittal 873, and initiated an investigation into various issues raised by this tariff filing.[4] The Bureau also granted GTOC interim authority under Section 214 to continue to operate the facilities necessary to provide video channel service to Apollo. In the same Order, we found that Transmittal 874 violated the Act and the Commission's rules that prohibit telephone common carriers from providing video programming directly to end users in their telephone service territory, and, accordingly, we rejected Transmittal 874.[5] We granted GTOC a 60-day period to comply with the telephone-cable cross-ownership restriction, so as to avoid any abrupt termination of cable programming service provided by Service Corp. to subscribers in Cerritos.[6]

3. On September 7, 1994, the United States Court of Appeals for the Ninth Circuit stayed the *Cerritos Tariff Order* "insofar as it rejects Transmittal 874."[7] On September 9, 1994, GTOC filed Transmittal No. 909 to add to its tariff the material it removed in response to the rejection of Transmittal 874. Thus, the revisions introduced in Transmittals 909 and 874 were identical. The Bureau concluded that Transmittal 909 raised substantial questions of lawfulness, suspended the tariff for one day, imposed an accounting order, and included Transmittal 909 in the pending investigation of Transmittal 873.[8]

4. In *GTE v. FCC*, the Court of Appeals held that GTECA's Section 214 authority for Transmittal 909 expired with the expiration of the cross-ownership waiver.[9] GTECA subsequently filed a petition for rehearing before the Court of Appeals, and that petition was denied on May 19, 1995.[10] We recognize that a district court has enjoined our enforcement of the statutory restriction[11] against a local exchange carrier's provision of video programming to end users.[12] We conclude, however, that that holding does not affect our authority to require GTECA to obtain authorization under Section 214 of the Act in order to maintain and operate the facilities it uses to provide transmission service offered under Transmittal 909.[13] Since the Ninth Circuit has rejected GTECA's position that its Section 214 authority survived the expiration of its cross-ownership waiver and has lifted the stay of the *Cerritos Tariff Order*, it is now indisputable that GTECA does not have Section 214 authority for the facilities it uses to provide the service for which it has filed the tariff revisions covered in Transmittal 909. On July 28, 1995, GTECA submitted a request for Section 214 authorization for the facilities it uses to provide video channel service to GTE Service Corp. in

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[1] General Telephone Company of California, 4 FCC Rcd 5693, 5700-01 (paras. 50-61) (1989) (*Waiver Review Order*).

[2] Section 613(b)(1) of the Cable Act of 1984, 47 U.S.C. § 533(b)(1); Section 63.54 of the Commission's Rules, 47 C.F.R. § 63.54.

[3] Transmittal No. 874, Description and Justification (D&J) at 1.

[4] GTE Telephone Operating Companies, CC Docket No. 94-81, 9 FCC Rcd 3613 (Com. Car. Bur. 1994) (*Cerritos Tariff Order*) (*applications for review pending*).

[5] *Id.* at 3615 (para. 16). *See* Section 613(b)(1) of the Cable Act of 1984, 47 U.S.C. § 533(b)(1); Section 63.54 of the Commission's Rules, 47 C.F.R. § 63.54.

[6] *Cerritos Tariff Order*, 9 FCC Rcd at 3615 (para. 18).

[7] GTE California, Inc. v. FCC, No. 93-70924 (9th Cir., filed Sept. 7, 1994).

[8] GTE Telephone Operating Companies, Revisions to Tariff F.C.C. No. 1, Transmittal No. 909, CC Docket No. 94-81, 9 FCC Rcd 5229 (Com. Car. Bur., 1994) (*Transmittal 909 Suspension Order*) at para. 3; *citing Cerritos Tariff Order*, 9 FCC Rcd at 3615 n.38.

[9] GTE California, Inc. v. FCC, 39 F.3d 940, 944-45 (9th Cir. 1994) (*GTE v. FCC*).

[10] GTE California, Inc. v. FCC, No. 93-70924 (9th Cir., filed May 19, 1995).

[11] Section 613(b)(1) of the Cable Act of 1984, 47 U.S.C. § 533(b)(1); Section 63.54 of the Commission's Rules, 47 C.F.R. § 63.54.

[12] *See* GTE South, Inc. v. United States, No. 94-1588-A, (E.D. Va., Jan.13, 1995). *See also* Chesapeake and Potomac Telephone Co. of Virginia v. United States, 42 F.3d 181 (4th Cir. 1994) (*C&P v. United States*); US West, Inc. v. United States, 48 F.3d 1092 (9th Cir. 1994) (*US West v. United States*).

[13] *See GTE v. FCC*, 39 F.3d at 945-47 (as a result of the expiration of GTECA's Section 214 authority, the Court did not need to reach the constitutionality issue in that case).

Cerritos, stating that it would be necessary for it to cease providing this service to GTE Service Corp. without this authorization. GTE requested that its application be granted on an expedited basis.[14]

5. Accordingly, we hereby direct GTOC either to apply for Section 214 authority within 15 days of the release date of this Order, or to notify us within that period that it intends to remove from its tariff the service it introduced in Transmittal 909 and to do so within 60 days of the release date of this Order.[15] If GTOC seeks Section 214 authority, we will grant GTOC temporary Section 214 authority to provide video channel service to Service Corp. while its application is pending. In that event, we will discuss the need to designate additional issues for investigation of Transmittal 909 in a subsequent Order. Alternatively, if GTOC withdraws this service, then the related portion of this investigation becomes moot, and it will not be necessary to designate additional issues in this investigation.

6. On July 26, 1994, GTE Service Corp. filed a motion for stay of the *Cerritos Tariff Order* with the Commission. National Cable Television Association (NCTA), Apollo CableVision, Inc. (Apollo), and the City of Cerritos, California (City or Cerritos) filed comments opposing this motion for stay. In light of the court of appeals' stay and its subsequent decision to lift the stay, we dismiss Service Corp.'s motion as moot.

7. Accordingly, IT IS ORDERED that the motion for stay filed by GTE Service Corporation IS DISMISSED AS MOOT.

8. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 214 of the Communications Act, 47 U.S.C. §§ 154(i), 214, that the GTE Telephone Operating Companies SHALL COMPLY WITH one of the following: (1) FILE an application for Section 214 authority to use its facilities to provide the service furnished under its Transmittal No. 909, no later than 15 days from the release date of this Order; or (2) NOTIFY the Bureau in writing, no later than 15 days from the release date of this Order that GTOC intends to terminate the service provided under Transmittal No. 909 and file tariff revisions, on five days' notice, to remove the unlawful portions of the tariff, no later than 60 days from the release date of this Order.

9. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 214 of the Communications Act, 47 U.S.C. §§ 154(i), 214, that if the GTE Telephone Operating Companies choose to seek Section 214 authorization, then the GTE Telephone Operating Companies ARE GRANTED interim authority to provide video channel service to GTE Service Corporation during the pendency of that application.

10. IT IS FURTHER ORDERED that, if GTE Telephone Operating Companies files tariff revisions to remove the material filed under Transmittal No. 909, Section 61.58 of the Commission's Rules, 47 C.F.R. § 61.58, is hereby waived for that purpose. GTE Telephone Operating Companies should cite the "DA" number of this Order as the authority for that filing.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

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[14] Letter from Whitney Hatch, GTE, to Secretary, FCC, July 28, 1995.

[15] The Commission is currently considering whether to establish blanket Section 214 authorization for LECs to construct or acquire a cable television system within its service area. *See* Public Notice, Supplemental Comments Sought on Possible Grant of Blanket Section 214 Authorization, CC Docket No. 87-266, DA 95-665 (released Apr. 3, 1995). Because the Commission has not yet granted any such blanket authorization, and because the blanket authorization under consideration is for cable television service rather than the video channel service that is the subject of this proceeding, GTECA is required to obtain Section 214 authorization or remove this service from its tariff.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 1, 1995

ON LINE DATA RESEARCH ACCESS

We are pleased to announce the addition of on-line data research features on the computer systems, located in the Wireless Telecommunications Bureau/Commercial Wireless Division, Public Reference and Information Branch in Room 628 at 1919 M. St. N.W., Washington, D.C. 20554.

In an effort to improve customer service and assure public access to prompt and efficient research information, we are offering access to on-line data research in Common Carrier Cellular and Common Carrier Land Mobile (CLM) services.

Information may be queried in a variety of methods: company name, file number, call sign, market number, coordinates and frequency, to name a few. The reference room staff will be available to show you how to access the on-line information. Also, system user manuals will be passed out during regular reference room hours.

Please refer any questions or comments to Maria Ringold, Chief WTB/CWD, Public Reference and Information Branch, located in Room 632-K at 1919 M. St. N.W., Washington, D.C. 20554 or she can be reached at 202-418-1350.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

PanAmSat Licensee Corporation, File Nos. CSS-91-005
CSS-91-006

For Modification of its Authority To
Construct, Launch, and Operate a
Hybrid Separate System International
Communication Satellite

MEMORANDUM OPINION, ORDER, AND AUTHORIZATION

Adopted: July 28, 1995 **Released: July 31, 1995**

By the Chief, International Bureau:

INTRODUCTION

1. By this Memorandum Opinion, Order, and Authorization, we grant PanAmSat Licensee Corporation's ("PanAmSat's") Application for Modification and Request for Final Authority to construct, launch, and operate its hybrid satellite ("PAS-6") on both C-band (4/6 GHz) and Ku-band (11-12/14 GHz) frequencies, to serve the Indian Ocean Region ("IOR"), as part of its separate international communications satellite system.[1]

2. PanAmSat has filed the above-captioned application to modify its conditional authority to construct, launch, and operate PAS-6, and to make that authority final. We placed the application on public notice on April 12, 1995.[2] Hughes Communications Galaxy, Inc. filed an objection, which was subsequently withdrawn following a status conference held by the International Bureau with both parties.[3] For the reasons set forth below, we grant PanAmSat's request to transfer its financial showing and the *final* construction authority for its PAS-7 satellite to PAS-6. Therefore, PanAmSat is left with a *conditional* construction authorization for its PAS-7 satellite.

BACKGROUND

3. PanAmSat currently has conditional authorization to construct, launch, and operate its PAS-6 satellite system, which was initially authorized to be located at 68° East Longitude ("E.L.").[4] This authorization was conditioned on PanAmSat's submission of the second-stage financial information required under the *Separate Systems* decision.[5] This requires PanAmSat to demonstrate sufficient non-contingent funds to meet the projected construction, launch, and first-year operational costs for its PAS-6 satellite. The Commission stated that, unless otherwise authorized, PanAmSat could not expend any funds on constructing PAS-6 until it submitted this showing.

4. The Commission also required PanAmSat to make its second-stage financial showing no later than 60 days following the State Department's notification to the Commission that the United States has fulfilled its Article XIV(d) obligations under the Intelsat Agreement.[6] The Article XIV(d) process is designed to address potential harm to the Intelsat satellite system. As a result of this process, PanAmSat now seeks authority to operate its PAS-6 satellite at 68.5° E.L., rather than 68° E.L.[7]

5. In addition to *conditional* authorization for PAS-6, PanAmSatp has received *final* construction authority for its PAS-7 satellite. PanAmSat received its PAS-7 authority on May 30, 1994, after demonstrating that it was financially qualified to cover the costs of construction, launch, and first-year operations for the satellite.[8] PAS-7 is assigned to 72S W.L. and will also serve the IOR. PanAmSat has been constructing its PAS-7 satellite pursuant to its final construction authority. However, due to various technical, marketing, and international satellite coordination issues, PanAmSat now seeks to launch this IOR satellite at 68.5° E.L., instead of at its 72° E.L. location. PanAmSat, therefore, requests that the final construction authority for its PAS-7 satellite be transferred to PAS-6.

6. PanAmSat's application to modify PAS-6 indicates that the cost of PAS-6 is approximately $20 million more than the cost of PAS-7. The showing relied upon in connection with PAS-7 indicated approximately $45 million funds available in excess of estimated cost.

DISCUSSION

7. The Commission has found that PanAmSat is financially and legally qualified with respect to PAS-7, and specifically that it has demonstrated sufficient noncontingent funds to cover the costs of its PAS-7 satellite

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[1] On December 31, 1992, the Common Carrier Bureau consented to the assignment by Alpha Lyracom, d/b/a Pan American Satellite of its international space station authorization for PAS-6, to PanAmSat, L.P. *See* Alpha Lyracom, d/b/a Pan American Satellite, Alpha Lyracom Space Communications, Inc., Cygnus Satellite Corp., 8 F.C.C. Rcd. 376 (Common Carrier Bureau 1992).

[2] Public Notice, Report No. SPB-7, released April 12, 1995.

[3] *See* Petition to Deny or Hold in Abeyance of Hughes Comm. Galaxy, Inc., for File Nos. 91-SAT-MP/LA-95; CSS-94-015; CSS-91-004 (May 12, 1995). No other parties oppose PanAmSat's application.

[4] *See* Alpha Lyracom, d/b/a/ Pan American Satellite (PAS-6), 7 F.C.C. Rcd. 2974 (1992).

[5] *See* Establishment of Satellite Systems Providing International Communications (Separate Systems), 101 F.C.C.2d 1046 (1985), *on recon.*, 61 Rad. Reg. 2d (P & F) 649 (1986), *further recon.*, 1 F.C.C. Rcd. 439 (1986).

[6] *Id.* at para. 16 and 17.

[7] *See* Article XIV(D) Technical Consultation Concerning the Proposed Use of the PanAmSat 4 Satellite Network at 68.5E (USASAT 14I), BG-102-31E and BG-102-27E (September 20, 1994). Intelsat has agreed to relocate its satellite registered for 69° E.L. to 72° E.L., pending the launch of PanAmSat's PAS-7 satellite into that orbital location.

[8] *See* PanAmSat Licensee Corp., 9 F.C.C. Rcd. 1867 (1994). *See also* Financial Showing for: PAS-4, File No. CSS-91-003 For Service to the Pacific Ocean Region "POR"); PAS-2, File No. CSS-88-003 (M) For Service to the Atlantic Ocean Region ("AOR"); and PAS-7, File No. CSS-91-006 for Service to the Indian Ocean Region ("IOR") (August 19, 1993).

system. The financial demonstration submitted in connection with PAS-7 is sufficient to establish that adequate funds are available to be transferred to the costs of PAS-6. Consequently, we will apply the full financial showing submitted for PanAmSat's PAS-7 satellite and the final construction authority to PAS-6.

8. We also find that PanAmSat's proposed PAS-6 satellite system, as modified, satisfies the technical requirements of the Separate Systems decision.[9] The spacecraft is capable of operating in a manner consistent with Commission rules and the International Radio Regulations. The technical proposal for PAS-6 also is consistent with the Commission's two-degree spacing policy, as required under the Separate Systems decision.[10] PanAmSat has successfully completed consultation, for a satellite at 68.5° E.L., pursuant to Article XIV(d) of the Intelsat Agreement.[11] We hereby grant final authorization for the construction, launch, and operation of the PAS-6 satellite system at 68.5° E.L.

9. Because the final authorization and the financial showing for PAS-7 satellite has been transferred to PAS-6, PanAmSat no longer meets the financial qualifications requirements with respect to PAS-7 and, therefore, is in the position with respect to PAS-7 that it was previously in with respect to PAS-6. Specifically, prior to issuing final authority to construct, launch and operate PAS-7, we will require PanAmSat to submit a showing that it is financially qualified to cover the costs of construction, launch and first-year operations of PAS-7.

CONCLUSION

10. We find that PanAmSat is legally, financially, and technically qualified to hold a final authorization to construct, launch and operate its PAS-6 international satellite system at 68.5° E.L. We also find that PanAmSat is qualified for conditional authorization to construct its PAS-7 satellite system. These authorizations are consistent with our orbit assignment policies and will serve the public interest, convenience, and necessity under section 309(a) of the Communications Act. We believe that PanAmSat's proposed expansion into the IOR, and the resulting worldwide interconnection capability, will provide substantial benefits to users of international satellite communications services. The grant of PanAmSat's application should provide the user benefits contemplated by the Commission in the *Separate Systems* decision, specifically: the stimulation of transmitting information over satellites; improved network efficiencies; reduced user costs; and the creation of new business and trade opportunities through improved international communications.[12] Given these important public interest benefits, we grant PanAmSat's application for modification and request for final authority for PAS-6. This authorization represents final authority for PanAmSat to construct, launch and operate its PAS-6 satellite.

11. Accordingly, IT IS ORDERED that pursuant to sections 4(i) and (j), 308, 309 and 319 of the Communications Act, as amended, 47 U.S.C. sections 4(i) and (j), 308, 309 and 319, and Section 0.261 of the Commission's Rules on delegations of authority, we grant PanAmSat's request to transfer the final construction authority for PAS-7 to PAS-6. Therefore, PanAmSat is authorized to construct, launch and operate its PAS-6 satellite system as described in its Application for Modification and Request for Final Authority to construct, launch and operate PAS-6.

12. IT IS FURTHER ORDERED that this authorization is conditioned upon the outcome of the Commission's pending rulemaking proceeding, Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellite and Separate International Satellite Systems, FCC 95-146 (Released April 25, 1995), and is without prejudice to any action the Commission deems appropriate in that proceeding.

13. IT IS FURTHER ORDERED that PanAmSat is assigned the orbital location of 68.5S East Longitude for operation of its PAS-6 satellite.

14. IT IS FURTHER ORDERED that the assignment of any orbital location to PanAmSat is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right of the use of the orbit or spectrum.

15. IT IS FURTHER ORDERED that PanAmSat will not be issued final authority to construct, launch and operate a satellite at 72^0 E.L. until it submits a showing that it is financially qualified with respect to that satellite.

16. IT IS FURTHER ORDERED that PanAmSat shall submit a showing that it is financially qualified to cover the costs of construction, launch, and first-year operation of PAS-7 within 60 days after completion of Intelsat consultation, pursuant to Article XIV(d), or within eighteen months from the release of this *Memorandum Opinion, Order, and Authorization*, whichever is earlier.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

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[9] See Separate Systems, 101 F.C.C.2d at 1166-73.
[10] *See id.* at 1177.
[11] *See* Letter from Steven W. Lett, Department of State, to George Li, FCC (September 28, 1994).
[12] *See* Separate Systems at 1177.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Guam Telephone Authority

Tariff F.C.C. No. 1 Transmittal Nos. 7, 9

ORDER

Adopted: July 31, 1995; Released: July 31, 1995

By the Deputy Chief, Tariff Division, Common Carrier Bureau:

1. Guam Telephone Authority (GTA) filed Transmittal No. 7 on April 12, 1995 to establish procedures for balloting and presubscription in connection with its proposed implementation of Feature Group D equal access on the island of Guam. On April 26 1995, IT&E Overseas, Inc. (IT&E) filed a petition for clarification of Transmittal No. 7, to which GTA replied on May 9, 1995. On July 28, 1995, GTA filed Transmittal No. 9 to clarify its earlier-filed transmittal.[1] Both transmittals are scheduled to become effective on August 1, 1995.

2. IT&E requests that the Commission require GTA to clarify its proposed balloting and allocation procedures.[2] IT&E states thatalthough it generally finds Transmittal No. 7 to be reasonable, the presubscription provisions set forth in GTA's transmittal are incomplete, unclear, and not in full conformance with the Commission's *Allocation Order*.[3] IT&E Petition at 1. IT&E contends that GTA should clarify its tariff by: (1) stating that it will accept IXC lists of customers who have made individual arrangements with a specific IXC to designate the IXC as their PIC; (2) expressly setting forth a random allocation process for such customers based upon current IXC presubscription ratios; and (3) stating that any alternative to allocation, such as call blocking or access code dialing, may not be substituted for the allocation process. *Id.* at 2. IT&E also urges that the Commission require GTA to revise its provisions regarding customer choice discrepancy to conform to the procedures set forth in the *Allocation Order*. *Id.* at 3.

3. GTA states that it modeled Transmittal No. 7 after the National Exchange Carrier Association (NECA) balloting and presubscription tariff. GTA argues that it does not believe that the minimal changes it made to NECA's tariff affected its legal sufficiency. GTA Reply at 1. According to GTA, it will accept IXC customer lists as required by the *Allocation Order*[4] and follow the allocation procedures mandated by the *Allocation Order*.[5] *Id.* at 1-2. GTA also contends that GTA's process regarding balloting or customer list discrepancies conforms with the *Allocation Order*. *Id.* at 3. Finally, GTA explains that it intends to block new customers from 1+ dialing until they select a PIC. *Id.* at 2-3.

4. The Common Carrier Bureau has reviewed the transmittals and all associated submissions. We conclude that no compelling argument has been presented by IT&E that the balloting and allocation procedures proposed by GTA in Transmittal No. 7 and revised in Transmittal No. 9 require further clarification.

5. Accordingly, IT IS ORDERED that the petition for clarification of Guam Telephone Authority Tariff F.C.C. No. 1, Transmittal No. 7, filed by IT&E Overseas, Inc. IS GRANTED to the extent described herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

David A. Nall
Deputy Chief, Tariff Division
Common Carrier Bureau

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[1] These revisions more closely conform GTA's balloting and allocation procedures to the Commission's presubscription Orders. Specifically, these revisions: (1) delete the "superballot" option contained in Transmittal No. 7 and add language clarifying that end users may contact interexchange carriers (IXCs) directly to select a primary interexchange carrier (PIC); (2) add language describing GTA's allocation process for end users who do not presubscribe to a PIC; and (3) clarify language concerning the procedures that GTA will apply in the case of ballot or IXC order discrepancies. GTA's revisions also delete an option that would, after conversion to equal access has been accomplished, allocate a new end user who fails to designate a PIC prior to the installation of telephone exchange service.

[2] IT&E also raised other concerns with Transmittal No. 7 that were addressed by Transmittal No. 9. *See* IT&E Petition at 2. Those concerns, as well as GTA's response to them, are not discussed in this Order.

[3] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, Memorandum Opinion and Order, 101 F.C.C. 2d 911 (1985) (*Allocation Order*), *recon. denied*, 102 F.C.C. 2d 503.

[4] *See Allocation Order*, 101 F.C.C. 2d at 928-29.

[5] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Part 2 of the Commission's Rules to Allocate Spectrum for the Fixed-Satellite Service in the 17.8 - 20.2 GHz Band for Government Use

MEMORANDUM OPINION AND ORDER

Adopted: July 28, 1995; Released: July 31, 1995

By the Commission:

1. By this action, we are amending the Commission's Table of Frequency Allocations by adding a footnote to permit use of the 17.8 - 20.2 GHz band for Government space-to-Earth ("downlink") fixed-satellite transmissions. We are also revising a footnote to limit Government use of this band to military systems. We take this action at the request of the Administrator, National Telecommunications and Information Administration ("NTIA") for the purpose of advancing, supporting, and accommodating the national defense.[1]

2. The 17.8 - 20.2 GHz band is allocated on a worldwide basis for FSS downlinks and domestically is predominately exclusive non-Government spectrum.[2] Uses of the 17.8 - 19.7 GHz general-purpose fixed spectrum include auxiliary broadcast, common carrier, private, cable television, digital electronic message service ("DEMS"), and digital termination service ("DTS") systems for data communications. The fixedsatellite downlink allocation at 17.7 - 20.2 GHz is conventionally paired with uplinks at 27.5 - 30 GHz. Uplinks for direct broadcast satellites have access to the 17.8 - 18.4 GHz band. The 19.7 - 20.2 GHz band is the downlink portion of the 20/30 GHz multipurpose satellite band.

3. On July 12, 1995, the Administrator, NTIA, requested that we add a United States footnote to the United States Table of Frequency Allocations.[3] The proposed footnote reads as follows:

> In the band 17.8 - 20.2 GHz, Government space stations and associated earth stations in the fixed-satellite (space-to-Earth) service may be authorized on a primary basis. For a Government geostationary satellite network to operate on a primary basis, the space station shall be located outside the arc measured from East to West, 700 W to 1200 W. Coordination between Government fixed-satellite systems and non-Government systems operating in accordance with the United States Table of Frequency Allocations is required.

NTIA states that the reallocation is essential to fulfill requirements for Government space systems to perform satisfactorily, that current Department of Defense ("DoD") requirements cannot be accommodated in frequency bands currently allocated for Government use, and that due to the likely consideration of this band at the 1995 World Radiocommunication Conference, this matter is urgent. NTIA further states that this matter involves military functions, as well as specific sensitive national security interests of the United States. NTIA therefore asks that we forgo notice and comment rulemaking procedure and immediately amend the Table of Frequency Allocations in accordance with its request.

4. During our inter-agency consultations, NTIA stated that these Government satellite systems would comply with the International Telecommunication Union's ("ITU's") Radio Regulations.[4] NTIA also stated that, because of the urgent national security interests at stake, the amended rules should be made effective immediately upon publication in the Federal Register. In addition, we proposed to revise Government Footnote G117 by adding a reference to the 17.8 - 20.2 GHz band, thereby limiting Government fixed-satellite use of the band to military systems. We made

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[1] *See* 47 U.S.C. § 151.

[2] Currently, 400 megahertz of this spectrum is shared between Government and non-Government services. Specifically, the 18.1 - 18.3 GHz band is allocated to the meteorological-satellite service (Earth-to-space) on a co-primary basis. Its use is limited to geostationary satellites. *See* International Footnote No. 870. The 18.6 - 18.8 GHz band is allocated to the earth-exploration satellite (passive) and space research (passive) services on a co-primary basis. *See* 47 C.F.R. § 2.106. The remaining 2 gigahertz of spectrum is currently allocated for exclusive non-Government use.

[3] Letter from Larry Irving, Administrator, NTIA to Reed E. Hundt, Chairman, FCC, dated July 12, 1995. Section 305(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 305(a), authorizes the President to assign frequencies to Federal Government stations. This authority has been delegated to the Assistant Secretary of Commerce for Communications and Information, who also serves as the Administrator, NTIA. *See* Pub. Law 102-538, 106 Stat. 3533 (1992). The Commission administers non-Government spectrum and NTIA administers Government spectrum. *See* 47 C.F.R. § 2.105 (a).

[4] For example, in the frequency band 17.7 - 19.7 GHz, "the power flux-density at the Earth's surface produced by emissions from a space station, including emissions from a reflecting satellite, for all conditions and for all methods of modulation, shall not exceed the following values:

> -115 dB (W/m2) in any 1 MHz band for angles of arrival between 0 and 5 degrees above the horizontal plane;
>
> -115 + 0.5(- 5) dB (W/m2) in any 1 MHz band for angles of arrival (in degrees) between 5 and 25 degrees above the horizontal plane;
>
> -105 dB (W/m2) in any 1 MHz band for angles of arrival between 25 and 90 degrees above the horizontal plane.

These limits relate to the power flux-density which would be obtained under assumed free-space propagation conditions." *See* ITU *Radio Regulations*, Edition of 1990, Revised in 1994, Nos. 2577-2580.1. In the frequency band 19.7 - 20.2 GHz, no terrestrial service is allocated and thus no sharing criteria is needed.

this proposal in order to preserve as much of the spectrum as possible for commercial systems. NTIA did not object to the proposed revision of G117.

5. Based on the foregoing, we find that this matter involves the exercise of military functions of the United States and that, because the request is based on urgent national security needs, notice and public procedure are, for good cause shown, impracticable, unnecessary, and contrary to the public interest. *See* 5 U.S.C. § 553 (a)(1),(b)(3)(B); *Bendix Aviation Corp. v. F.C.C.*, 272 F.2d 533 (D.C. Cir. 1959), *cert. denied sub nom. Aeronautical Radio, Inc. v. U.S.*, 361 U.S. 965 (1960). Based on the representations of NTIA that the reallocation is essential to fulfill requirements for Government space systems to perform satisfactorily and that current DoD requirements cannot be accommodated in frequency bands currently allocated for Government use, we find that the public interest will best be served by accommodating the NTIA request and immediately adding United States Footnote US334 to and amending Government Footnote G117 of the Table of Frequency Allocations.[5]

6. Accordingly, IT IS ORDERED that Part 2 of the Commission's Rules, 47 C.F.R. Part 2, IS AMENDED as set forth in the attached Appendix, effective upon publication in the Federal Register.[6] Authority for this action is contained in Sections 4(i), 4(j), 303(c), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 154(j), 303(c), and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix: Final Rules

Part 2 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation in Part 2 continues to read as follows:

AUTHORITY: Sections 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations, is amended as follows:

a. Columns 4 and 5 in the frequency band 17.8 - 20.2 GHz are revised as follows:

§ 2.106 Table of Frequency Allocations.

* * * * *

[5] We also are ministerially adding non-Government Footnote NG144 to the non-Government table in both the 18.6 - 18.8 GHz and 18.8 - 19.7 GHz bands in order to correct their previous inadvertent omission. See the Appendix. *See also Digital Termination Systems and Digital Electronic Message Services* (Second Report and Order), General Docket No. 79-188, 48 Fed. Reg. 50322 at ¶ 39 & Appendix B at A (November 1, 1983). Because this is a ministerial correction and not a substantive change to the rules, notice and comment are unnecessary. *See* 5 U.S.C. § 553 (b)(3)(B).

[6] Because this rule change is based upon urgent national security interests and will not have a significant impact on existing licensees we find good cause to make this rule change effective upon publication in the Federal Register. 5 U.S.C. Section 553(d)(3).

International table			United States table		FCC use designators	
Region 1-allocation GHz	Region 2-allocation GHz	Region 3-allocation GHz	Government Allocation GHz	Non-Government Allocation GHz	Rule Part(s)	Special-use frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*	*	*
17.7 - 18.1 FIXED FIXED-SATELLITE (space-to-Earth)(Earth-to-space) 869 MOBILE						
			17.8 - 18.6 870 US334 G117	17.8 - 18.6 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE 870 US334 NG144	AUXILIARY BROADCASTING (74) CABLE TELEVISION RELAY (78) DOMESTIC PUBLIC FIXED (21) PRIVATE OPERATIONAL-FIXED MICROWAVE (94)	
18.1 - 18.6 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE 870						
18.6 - 18.8 FIXED FIXED-SATELLITE (space-to-Earth) 872 MOBILE except aeronautical mobile Earth Exploration- Satellite (passive) Space Research (passive) 871	18.6 - 18.8 EARTH EXPLORATION- SATELLITE (passive) FIXED FIXED-SATELLITE (space-to-Earth) 872 MOBILE except aeronautical mobile SPACE RESEARCH (passive) 871	18.6 - 18.8 FIXED FIXED-SATELLITE (space-to-Earth) 872 MOBILE except aeronautical mobile Earth Exploration- Satellite (passive) Space Research (passive) 871	18.6 - 18.8 EARTH EXPLORATION- SATELLITE (passive) SPACF RESEARCH (passive) US254 US255 US334 G117	18.6 - 18.8 EARTH EXPLORATION- SATELLITE (passive) FIXED FIXED-SATELLITE (space-to-Earth) MOBILE except aero- nautical mobile SPACE RESEARCH (passive) US254 US255 US334 NG144	AUXILIARY BROADCASTING (74) CABLE TELEVISION RELAY (78) DOMESTIC PUBLIC FIXED (21) PRIVATE OPERATIONAL-FIXED MICROWAVE (94)	
18.8 - 19.7 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE			18.8 - 19.7 US334 G117	18.8 - 19.7 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE US334 NG144	AUXILIARY BROADCASTING (74) CABLE TELEVISION RELAY (78) DOMESTIC PUBLIC FIXED (21) PRIVATE OPERATIONAL-FIXED MICROWAVE (94)	

International table			United States table		FCC use designators	
Region 1-allocation GHz	Region 2-allocation GHz	Region 3-allocation GHz	Government Allocation GHz	Non-Government Allocation GHz	Rule Part(s)	Special-use frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
19.7 - 20.1 FIXED-SATELLITE (space-to-Earth) Mobile-Satellite (space-to-Earth) 873	19.7 - 20.1 FIXED-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) 873 873A 873B 873C 873D 873E	19.7 - 20.1 FIXED-SATELLITE (space-to-Earth) Mobile-Satellite (space-to-Earth) 873	19.7 - 20.1 US334 G117	19.7 - 20.1 FIXED-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) 873A 873B 873C 873D 873E US334		
20.1 - 20.2	FIXED-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) 873 873A 873B 873C 873D		20.1 - 20.2 US334 G117	20.1 - 20.2 FIXED-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) 873A 873B 873C 873D US334		
*	*	*	*	*	*	*

b. Add the text of new United States footnote US334 to read as follows:

UNITED STATES (US) FOOTNOTES

* * * * *

US334 In the band 17.8 - 20.2 GHz, Government space stations and associated earth stations in the fixed-satellite (space-to-Earth) service may be authorized on a primary basis. For a Government geostationary satellite network to operate on a primary basis, the space station shall be located outside the arc measured from East to West, 700 W to 1200 W. Coordination between Government fixed-satellite systems and non-Government systems operating in accordance with the United States Table of Frequency Allocations is required.

c. Revise the text of existing Government footnote G117 to read as follows:

GOVERNMENT (G) FOOTNOTES

* * * * *

G117 In the bands 7.25 - 7.75 GHz, 7.9 - 8.4 GHz, 17.8 - 21.2 GHz, 30 - 31 GHz, 39.5 - 40.5 GHz, 43.5 - 45.5 GHz, and 50.4 - 51.4 GHz the Government fixed-satellite and mobile-satellite services are limited to military systems.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-73

In the Matter of

Amendment of Section 73.202(b), RM-8568
Table of Allotments,
FM Broadcast Stations.
(Boonville and Fayette,
Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 1, 1995; Released: September 12, 1995

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 10 FCC Rcd 598 (1995), issued in response to a petition filed by Big Country of Missouri ("petitioner"), proposing the substitution of Channel 230C3 for Channel 230A at Boonville, Missouri, and modification of the license for Station KTLH accordingly. Petitioner also requested reallotment of Channel 230C3 from Boonville, Missouri, to Fayette, Missouri, in accordance with the provisions of Section 1.420(i) of the Commission's Rules. Petitioner filed comments supporting its proposal. No other comments were received at the Commission.

2. Based upon the information presented in this proceeding, we believe the public interest would be served by substituting Channel 230C3 for Channel 230A and reallotting the channel from Boonville to Fayette, Missouri, since it would result in a preferential arrangement of allotments pursuant to the Commission's Change of Community procedures. *See Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1995), *recon. granted in part*, 5 FCC Rcd 7094 (1990). Fayette is the County Seat of Howard County. It is an incorporated community with its own post office, zip code and hospital. Fayette also has a local college with 900 students. We believe Fayette is an independent community deserving of its first local aural transmission service. Fayette (population 2,888)[1] would receive its first local service, thus triggering allotment priority (3).[2] This action will not deprive Boonville (population 7,095) of local service as Stations KCLF-FM and KWRT-AM are licensed to the community. Moreover, as Fayette is not located within an urbanized area, the reallotment will not result in the transfer of a station from a rural to a larger urban area. The closest urbanized area is Columbia, Missouri, which is located approximately 30 miles from Fayette. Since petitioner is moving its transmitter site, there will be a gain and loss area. The loss area at Boonville contains 697 people and covers approximately 132 square kilometers (51 square miles). The gain area at Fayette contains 44,792 people and covers approximately 2,277 square kilometers (888 square miles). While we carefully evaluate any proposal that would result in the loss of existing reception service, the loss area of Channel 230A at Boonville is completely covered by at least five full-time reception services and is, therefore, considered to be well served. Therefore, in accordance with Section 1.420(g) and (i) of the Commission's Rules, we will modify the license for Station KTLH to specify operation on Channel 230C3 in lieu of Channel 230A at Fayette, Missouri.

3. Channel 230C3 can be allotted to Fayette, Missouri, in compliance with the Commission's minimum distance separation requirements with a site restriction 19.3 kilometers (12 miles) east of the community.[3] The site restriction will prevent a short spacing to Station KFKF-FM, Channel 231C, Kansas City, Kansas.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 27, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Boonville, Missouri	257C2
Fayette, Missouri	230C3

5. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, asamended, that the license of Station KTLH, Boonville, Missouri, IS MODIFIED to specify operation on Channel 230C3 at Fayette, Missouri, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

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[1] Population figures are from the 1990 Census.

[2] The FM allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. [Co-equal weight is given to priorities (2) and (3).] *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

[3] The coordinates for Channel 230C3 at Fayette are 39-05-00 and 92-28-30.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Big Country of Missouri, licensee, of Station KTLH, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-189

In the Matter of

Amendment of Section 73.202(b),	RM-6904
Table of Allotments,	RM-7114
FM Broadcast Stations.	RM-7186
(Farmington, Grass Valley, Jackson,	RM-7415
Linden, Placerville and Fair Oaks,	RM-7298
California, Carson City and Sun Valley, Nevada)[1]	

FIRST REPORT AND ORDER

Adopted: September 1, 1995; Released: September 12, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making and Orders to Show Cause* in this proceeding consolidating three separate petitions for rule making which were either mutually exclusive or in some manner interrelated. 5 FCC Rcd 2137 (1990). In response to the *Notice*, Nevada County Broadcasters, Inc. ("Nevada County") filed a Response to Order to Show Cause and Petition for Rule Making. Gold Country Communications, Inc. ("Gold Country"), Denise Neubauer ("Neubauer"), Eric R. Hilding ("Hilding"), and Wade Axell filed comments. Sapphire Broadcasting, Inc. ("Sapphire Broadcasting") filed a Petition for Rule Making and an Amended Petition for Rule Making. Nevada County, Hilding, Gold Country, Sapphire Broadcasting, WGN of California, Inc. ("WGN"), Hillcrest Motor Company ("Hillcrest"), Genesis Broadcasting, Inc. ("Genesis") and Nationwide Communications, Inc. ("Nationwide") filed reply comments. Great American Television and Radio Co., Inc., Summit-Atlanta Broadcasting Corporation and WSB, Inc. ("Great American") filed joint reply comments. EZ Communications, Inc. ("EZ Communications") filed a Petition to Dismiss or Reply Comments. Sapphire Broadcasting filed a Petition for Leave to File Supplemental Comments and Supplemental Comments. EZ Communications and Nevada County filed Oppositions to the Petition for Leave, and the Brown Organization filed Comments directed to the Petition for Leave. Nevada County filed a Request for Leave to File Supplemental Comments and Supplemental Comments. For the reasons discussed below, we are adopting a *First Report and Order* allotting Channel 232A to Farmington, California, and upgrading Station KNCO, Grass Valley, California, to specify operation on Channel 232B1. In a *Second Report and Order* in this proceeding, we will consider the Sapphire Broadcasting Petition for Rule Making and Amended Petition for Rule Making as a timely filed counterproposal.

BACKGROUND

2. This proceeding began with the filing of three separate petitions for rule making. The first petition for rule making was filed by Neubauer proposing the allotment of Channel 258A to Placerville, California, as a second local FM service (RM-7186). The second petition for rule making was filed by Hilding proposing the allotment of Channel 232A to Farmington, California, as a first local broadcast service (RM-6904). In order to accommodate this allotment, Hilding also proposed the substitution of Channel 259A for Channel 232A at Jackson, California, and modification of the license of Station KNGT, Channel 232A, Jackson, California, to specify operation on Channel 259A. This proposed Channel 259A substitution at Jackson conflicted with the proposed Channel 258A allotment at Placerville. The third petition for rule making was filed by Gold Country, licensee of Station KNGT, Channel 232A, Jackson, California, proposing the substitution of Channel 232B1 for Channel 232A at Jackson, and modification of its Station KNGT license to specify operation on Channel 232B1 (RM-7114). In order to accommodate this upgrade proposal, Gold Country proposed the substitution of Channel 231A for Channel 232A at Grass Valley, California, and modification of the license of Station KNCO, Channel 232A, Grass Valley, to specify operation on Channel 231A.[2] The proposed Channel 232B1 upgrade at Jackson conflicted with the proposed Channel 232A allotment at Farmington.

3. In response to the *Notice of Proposed Rule Making and Orders to Show Cause* setting forth the three proposals in this proceeding, Nevada County, licensee of Station KNCO, Channel 232A, Grass Valley, California, filed a Response to Order to Show Cause and Petition for Rule Making. In that pleading, Nevada County proposed the substitution of Channel 232B1 for Channel 232A at Grass Valley, and modification of its Station KNCO license to specify operation on Channel 232B1. The proposed Channel 232B1 upgrade for Station KNCO conflicts with the proposed Channel 232B1 upgrade for Station KNGT in Jackson, and

[1] The communities of Fair Oaks, Linden, Carson City and Sun Valley have been added to the caption.

[2] Section 1.401(d) of the Commission's Rules requires that petitions for rule making be served on any licensee or permittee whose channel would be changed by grant of the petition for rule making. In the present situation, Hilding did not serve a copy of his petition for rule making on Gold Country, licensee of Station KNGT, Channel 232A, Jackson, that he was proposing the modification of the Station KNGT license to specify operation on Channel 259A. Similarly, Gold Country did not serve a copy of its petition for rule making on Nevada County, licensee of Station KNCO, Channel 232A, Grass Valley, that it was proposing the modification of the Station KNCO license to specify operation on Channel 231A. Failure to comply with Section 1.401(d) of the Rules by Hilding and Gold Country does not represent the degree of diligence that we expect from parties in a rule making proceeding. However, we note that both parties filed timely comments in this proceeding providing the appropriate copies to Gold Country and Nevada County in compliance with Section 1.401(d) of the Rules. As such, both Hilding and Gold Country could have had their proposals considered as timely filed counterproposals in this proceeding. In view of this fact and the fact that neither Gold Country nor Nevada County has been prejudiced by the respective failures to comply with Section 1.401(d) of the Rules, both petitions for rule making will be considered in this proceeding.

also requires the substitution of Channel 259A for Channel 232A at Jackson, and modification of the Station KNGT license to specify operation on Channel 259A. In addition, Nevada County proposed the allotment of Channel 232A to Linden, California, as a first local broadcast service (RM-7415). This proposal conflicts with the proposed Channel 232A allotment for Farmington, and also requires the substitution of Channel 259A for Channel 232A at Jackson.

4. In a separate context, Sapphire Broadcasting, licensee of Station KIZS (formerly KNIS and KRWR), Channel 234C, Carson City, Nevada, filed a Petition for Rule Making (RM-7298). That Petition for Rule Making proposed the substitution of Channel 234B1 for Channel 234C and reallotment of the channel from Carson City to Fair Oaks, California, as a first local service. On May 22, 1990, Sapphire Broadcasting filed an Amended Petition for Rule Making proposing the allotment of Channel 233C2 to Sun Valley, Nevada, as a first local FM service. The proposed Channel 233C2 allotment at Sun Valley requires the deletion of the Channel 234C allotment at Carson City, and conflicts with the proposed Channel 232B1 upgrade at Grass Valley. In view of the fact that the Amended Petition for Rule Making was filed prior to the May 29, 1990, comment date in this proceeding, we are processing the Sapphire Broadcasting proposals as a timely filed counterproposal in this proceeding. In order to expedite the resolution of this proceeding, we will consider the Sapphire Broadcasting proposal in a *Second Report and Order*.

DISCUSSION

Linden and Farmington, California

5. In his Petition for Rule Making, Hilding proposed the allotment of Channel 232A to Farmington, California, as a first local service. As stated above, Nevada County filed a conflicting counterproposal proposing the allotment of Channel 232A to Linden, California, as a first local service. Both proposals require the substitution of Channel 259A for Channel 232A at Jackson, California. At the outset, it is necessary to resolve the conflict between the competing proposals for Linden and Farmington.

6. In this situation, we would allot Channel 232A to Farmington, California.[3] In proposing a Channel 232A allotment for Linden, Nevada County filed its Response to Order to Show Cause and Petition for Rule Making on May 29, 1990. Since the Linden proposal was filed after the October 29, 1989, effective date of the Commission action increasing the power of Class A FM stations to six kilowatts and revising the spacing requirements in Section 73.207(b) of the Rules, it was necessary for the proposal to comply with Section 73.207(b) of the Rules then in effect.[4] A Channel 232A allotment at Linden would be short-spaced to noncommercial educational FM Station KPFA, Channel 231B, Berkeley, California. In this regard, Nevada County argues that since the conflicting Farmington proposal was accepted under the previous spacing requirements set forth in Section 73.207(b) of the Rules, it should be afforded similar consideration. However, the fact remains that the Farmington proposal was filed prior to the effective date of the new spacing requirements and the Linden proposal was filed after the effective date. There is nothing in the Commission action establishing the new spacing requirements in Section 73.207(b) and the October 29, 1989, effective date that would suggest that counterproposals in rulemaking proceedings filed after the effective date do not have to comply with the spacing requirements now in effect. (We also note that Nevada County could have filed its Channel 232A proposal for Linden prior to October 29,1989.) In view of the above, we are not able to consider a Channel 232A allotment for Linden in this proceeding.

Farmington, Jackson, Placerville and Grass Valley, California

7. The proposals for Farmington, Jackson, Placerville, Grass Valley, and Sun Valley are interrelated. As stated earlier, a Channel 232A allotment at Farmington requires a Channel 259A for Channel 232A substitution at Jackson. In turn, a Channel 259A substitution at Jackson conflicts with the proposed Channel 258A allotment at Placerville. Thus, the Farmington and Placerville proposals are mutually exclusive. In addition, Gold Country, licensee of Station KNGT, Channel 232A, Jackson, has filed a petition for rule making proposing a Channel 232B1 upgrade for Station KNGT. This proposal conflicts with the proposed Channel 232A allotment for Farmington. In order to accommodate this proposed Channel 232B1 upgrade, Gold Country also proposes the substitution of Channel 231A for Channel 232A at Grass Valley. However, Nevada County, licensee of Station KNCO, Channel 232A, Grass Valley, filed a counterpropsal proposing a Channel 232B1 upgrade for Station KNCO. This upgrade proposal conflicts with the Channel 232B1 upgrade proposal for Jackson. As a result of these interrelationships, it is necessary to compare a new allotment at Farmington and an upgrade at Grass Valley versus a new allotment at Placerville and an upgrade at Jackson.

8. Conflicting sets of proposals are comparatively considered under the guidelines set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). The priorities are as follows:

1) First full-time aural service
2) Second full-time aural service
3) First local service
4) Other public interest matters

(Co-equal weight is given to priorities (2) and (3))

Under these guidelines, we are allotting Channel 232A to Farmington, California, and are upgrading Station KNCO, Grass Valley, California, to specify operation on Channel

[3] According to the 1990 U.S. Census, Farmington has a population of 250 persons. In addition to its own U.S. Post Office, Farmington has its own public services, including the Farmington Water Company, the Farmington Rural Fire Protection District, and the Farmington Elementary School. Businesses in Farmington include a general store, a restaurant, a wagon-carriage repair shop. For these reasons, we conclude that Farmington is a community within the meaning of Section 307(b) of the Communications Act of 1934. *See Essex, California*, 4 FCC Rcd 8084 (1989); *Semora, North Carolina*, 5 FCC Rcd 934 (1990).

[4] *See Amendment of Part 73 of the Rules to Provide for an Additional Class (Class C3) and to Increase the Maximum Transmitting Power for Class A FM Stations*, 4 FCC Rcd 6375 (1989).

232B1.[5] In order to accommodate this new allotment and upgrade, we are substituting Channel 259A for Channel 232A at Jackson, California, and are modifying the license of Station KNGT, Channel 232A, Jackson, to specify operation on Channel 259A.[6] There are two reasons to prefer the Farmington and Grass Valley allotments. First, as a first local service, an allotment to Farmington would be preferred under priority (3) over a second local service to Placerville. Second, the upgrade for Station KNCO in Grass Valley will provide additional service to approximately 54,000 persons (increasing coverage from 54,000 to 108,000 persons). In comparison, the proposed upgrade for Station KNCO in Jackson that would have provided additional service to approximately 46,000 persons (increasing coverage from 25,000 to 71,000 persons).

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 27, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

Community	Channel No.
Farmington, California	232A
Grass Valley, California	232B1
Jackson, California	259A

10. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Nevada County Broadcasters, Inc. for Station KNCO, Channel 232A, Grass Valley, California, IS MODIFIED, to specify operation on Channel 232B1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (FCC Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Commission's Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

11. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Gold Country Communications, Inc. for Station KNGT, Channel 232A, Jackson, California, IS MODIFIED to specify operation on Channel 259A, subject to the following conditions:

(a) Nothing contained herein shall be construed to authorize any change in the authorization for Station KNGT except the channel as described above. Any other changes, except for those so specified under Section 73.1690 of the Commission's Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Commission's Rules, PROVIDED the transmission facilities comply in all respects with the authorization for Station KNGT except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

12. IT IS FURTHER ORDERED, That the counterproposal filed by Nevada County Broadcasters, Inc. for a Channel 232A allotment at Linden, California (RM-7415), IS DENIED.

13. IT IS FURTHER ORDERED, That the Petition for Rule Making filed by Gold Country Communications, Inc. proposing a Channel 232B1 upgrade for Station KNGT at Jackson, California (RM-7114) IS DENIED.

14. IT IS FURTHER ORDERED, That the Petition for Rule Making filed by Denise Neubauer for a Channel 258A allotment at Placerville, California (RM-7186) IS DENIED.

15. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Report and Order* BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to Gold Country Communications, Inc., Station KNGT, Box 609, Jackson, California 95642.

16. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau (202) 634-6530.

[5] The reference coordinates for the Channel 232A allotment at Farmington, California, are 37-57-00 and 121-00-00. This site is 2.1 kilometers (1.3 miles) north of Farmington. Because the petition for rule making was filed prior to October 2, 1989, an applicant for the Farmington allotment may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to Station KPFA, Channel 231B, Berkeley, California. The reference coordinates for the Channel 232B1 allotment at Grass Valley, California, are 39-14-44 and 120-57-52. This site is 9.1 kilometers (5.6 miles) northeast of Grass Valley. This allotment will not conflict with a Channel 233C2 allotment at Sun Valley, Nevada. In the event we allot Channel 233C2 to Sun Valley in a *Second Report and Order*, it would be at alternate reference coordinates which would accommodate the Channel 232B1 upgrade at Grass Valley.

[6] The reference coordinates for the Channel 259A allotment at Jackson, California, are 38-20-24 and 120-43-13. Because the underlying petition for rule making was filed prior to October 2, 1989, the provisions of Section 73.213(c)(1) of the Commission's Rules would be applicable with respect to Station KFRC, Channel 260B, San Francisco, California, and Station KCIV, Channel 260B, Mount Bullion, California. In accordance with Commission policy, Nevada County Broadcasters, Inc., and the ultimate permittee of the Channel 232A allotment at Farmington will be responsible, on an equal basis, for reimbursing Gold Country Communications, Inc., licensee of Station KNGT, for the reasonable costs of changing its channel.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-113

In the Matter of

Amendment of Section 73.202(b),	RM-8514
Table of Allotments,	RM-8517
FM Broadcast Stations.	RM-8569
(Cape Girardeau, Chaffee,	RM-8570
Scott City & Miner, Missouri,	
and Union City, Tennessee)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 1, 1995; Released: September 12, 1995

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 9 FCC Rcd 5715 (1994), proposing the allotment of Channel 230A to Cape Girardeau, Missouri, as that community's third FM broadcast service. The *Notice* was issued in response to a petition filed by Kevin G. Greaser ("Greaser"). Greaser filed comments restating his interest in Channel 230A at Cape Girardeau. Stephen W. Sikes ("Sikes"), Scott City Broadcasters ("SCB") and Twin States Broadcasting, Inc. ("Twin States") filed counterproposals.[1] Greaser filed reply comments.

2. Sikes counterproposed the allotment of Channel 229A to Miner, Missouri (RM-8570). According to Sikes, the requested allotment would provide a first local service to Miner, an incorporated community with 1,218 people. In support of the requested allotment, Sikes states that Miner has its own local government consisting of a mayor and four aldermen, its own police and volunteer fire department and a water treatment plant. Further, Miner's principal business include the Sikeston Factory Outlet with 44 stores, Manor Aluminum, James Trailer Co., D&D Trailer Manufacturing, Inc. and four motels. Sikes has stated his intention to construct and operate a commercial broadcast station in Miner, if the counterproposal is granted.

3. SCB counterproposed the allotment of Channel 230A to Scott City, Missouri, as that community's first local transmission service (RM-8569). In support of the counterproposal, SCB provided information showing that Scott City has the attributes of a community for allotment purposes. SCB stated its intention to apply for Channel 230A if allotted to Scott City.

4. Twin States filed a counterproposal requesting substitution of Channel 284C2 for Channel 285A at Union City, Tennessee, and modification of its license for Station WKWT(FM) accordingly (RM-8517). To accommodate the upgrade at Union City, Twin States also requests the substitution of channel 230A for Channel 284A at Chaffee, Missouri. Twin States indicated it will reimburse Station WYRX(FM), Channel 284A, for the reasonable expenses incurred as a consequence of the change in its operating frequency. Twin States argues that its proposal should be preferred over Cape Girardeau as Channel 284C2 at Union City will provide more service to underserved areas and serves a greater overall population. According to Twin States, its proposal will provide 543 persons with a third aural reception service, 8,691 persons with a fourth aural reception service, and 11,936 persons with a fifth aural reception service while the allotment at Cape Girardeau would provide, at best a sixth service to 816 persons.

5. Greaser, in reply comments, continues to support the allotment of a channel at Cape Girardeau. Greaser states, however, that in the event the Commission were to allocate a channel to Scott City, Missouri, instead of Cape Girardeau, Missouri, he would file an application for that allotment and promptly build a station in the event he is granted a construction permit. In response to the counterproposal for Miner, Missouri, Greaser argues that Miner is ineligible for an allotment under established Commission precedent. Greaser believes the proposed Miner, Missouri, allotment should be rejected or in the alternative, the Commission should ascertain whether an alternate channel is available for allotment at Miner. Greaser argues, with respect to the Twin States proposal, that it should also be rejected. Greaser points out that he is requesting a new allotment while Twin States is proposing an upgrade which will not result in a new broadcast service but merely allow Twin States to expand the service area for its existing station. Greaser submits that the public interest warrants the allocation of a new service over increasing the coverage area for an existing station.

6. We have before us four mutually exclusive proposals. In an effort to accommodate all the proposals, the staff performed a search to determine if alternate channels were available to provide new or additional service to the communities. Our analysis indicates Channel 296A can be allotted to Miner, Missouri, thereby removing the conflict with the other communities in this proceeding. The study further indicates that there are no other channels meeting the spacing requirements that will resolve the remaining conflicts. Therefore, our decision in this proceeding for the remaining communities is guided by the allotment priorities in *Revision of FM Assignments and Policies and Procedures*, 90 FCC 2d 88 (1982).[2] The allotment of Channel 230A at Scott City will provide a first local service, fulfilling priority (3). The proposal for Union City, Tennessee, to substitute Channel 284C2 for Channel 285A and substitution of Channel 230A for Channel 284A at Chaffee, Missouri, to accommodate Union City, and the proposal for Cape Girardeau, Missouri, to add a third local FM broadcast service, would both be considered under priority

[1] Public notice of the counterproposals was given on December 28, 1994, Report No. 2050.

[2] (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) Other public interest matters. [Co-equal weight given to priorities (2) and (3).]

(4), other public interest matters. While our engineering analysis agrees with Twin States that its proposed upgrade at Union City could provide a third, fourth and fifth aural service, a first local service is generally preferred over a proposal to upgrade an existing facility. *See Benton, Arkansas*, 2 FCC Rcd 1963, 1965 (1987) and *Lafayette, Tennessee*, 6 FCC Rcd 3289 (1991). Based on the information presented in this proceeding and the above analysis, Scott City is afforded the higher priority and must be preferred over the Twin States and Greaser proposals, since it will provide a first local service to the community.[3] *See Epworth and Dyersville, Iowa*, 7 FCC Rcd 106 (1992).

7. Channel 296A can be allotted to Miner, Missouri, in compliance with the spacing requirements provided there is a site restriction 7.6 kilometers (4.7 miles) southwest of the community.[4] The site restriction will prevent a short-spacing to Station KMIS-FM, Channel 293C2, New Madrid, Missouri, Station WWYN, Channel 295C1, McKenzie, Tennessee, and to Station WDDD-FM, Channel 297B, Marion, Illinois. Channel 230A can be allotted to Scott City, Missouri, in compliance with the Commission's spacing requirements without a site restriction.[5]

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 27, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Miner, Missouri	296A
Scott City, Missouri	230A

9. IT IS FURTHER ORDERED, That the Secretary of the Commission, Shall send by Certified Mail, Return Receipt Requested a copy of this *Order* to the following:

Eric S. Kravetz
Brown, Nietert & Kaufman, Chartered
1920 N Street, N.W., #660
Washington, D.C. 20036
(counsel for Twin States Broadcasting)

Jeffrey D. Southmayd
Southmayd & Miller
1220 Nineteenth Street, N.W.
Suite 400
Washington, D.C. 20036
(counsel for Kevin G. Greaser)

Chartres Media, Inc.
c/o Station KYRX(FM)
185 West Park Mall
Cape Girardeau, Missouri
63701

10. The window period for filling applications for Channel 296A at Miner, Missouri, and Channel 230A at Scott City, Missouri, will open on **October 27, 1995** and close on **November 27, 1995**.

11. IT IS FURTHER ORDERED, That the counter-proposal filed by Twin States Broadcasting, Inc. (RM-8517) IS DISMISSED.

12. IT IS FURTHER ORDERED, That the petition filed by Kevin G. Greaser (RM-8514) IS DISMISSED.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[3] In *FM Priorities*, we specifically stated that these Priorities are intended to meet our obligation under Section 307(b) of the Communications Act of 1934, as amended, to provide "a fair, efficient, and equitable distribution of radio service."

[4] The coordinates for Channel 296A at Miner, Missouri, are 36-55-14 and 89-40-00.

[5] The coordinates for Channel 230A at Scott City, Missouri, are 37-13-00 and 89-31-28.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

V Cable, Inc. CUID No. OH1022
(Sheffield Lake)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: September 6, 1995; Released: September 12, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection andCompetition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaint in the franchise area which is the subject of this Order was completed and served on Operator on September 16, 1993 and received by the Commission on September 20, 1993. Operator filed FCC Form 393 in response; Operator amended its justification on February 17, 1995, April 13, 1995, and May 26, 1995 in response to Commission letters which requested further clarification of Operator's showing.[11]

5. Operator restructured its rates on September 1, 1993 in an effort to comply with the Commission's rules. On October 1, 1993, Operator changed its service offerings by deleting HSN II from the CPS tier and adding WQHS to the basic tier. On January 1, 1994, Operator again changed its offerings by moving WTBS from the CPS tier to the basic tier. Despite these changes in Operator's channel line-up, Operator did not adjust its price for either its basic or its CPS tier.

6. Operator in effect increased the rate charged for its CPS tier by reducing the number of channels on the tier without a concomitant reduction in price. The instructions to FCC Form 393 clearly require that when a complaint regarding CPS rates is pending before the Commission, the cable operator must inform the Commission of any CPS rate increase and submit a revised Form 393.[12] Operator failed to notify the Commission of the rate change as required in the instructions to Form 393. The maximum permitted CPS rate must be calculated (1) at the initial date of regulation; (2) for the period after the October 1993 CPS channel reduction; and (3) for the period after the January 1994 CPS channel reduction. In order to derive the maximum permitted CPS rate at the initial date of regulation, the maximum permitted per channel rate must be calculated using the number of channels offered at the initial date of regulation. This maximum permitted per channel rate is then multiplied by the number of CPS

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Letter from Peter G. Wolfe, FCC, to Chad G. Hume, Cablevision (Feb. 13, 1995); letter from Peter G. Wolfe, FCC, to Chad G. Hume, Cablevision (Mar. 7, 1995); letter from Peter G. Wolfe, FCC, to Chad G. Hume, Cablevision (May 3, 1995).

[12] FCC Form 393, General Instruction 1, at 2.

channels offered at that date. For the two subsequent periods when channel reductions took place, this maximum permitted per channel rate must be multiplied by the number of channels offered after the reductions occurred.

7. Upon review, we have calculated Operator's maximum permitted rates as follows for the three periods involved in this filing:

a. For the period from the date of the filing of the initial complaint through September 30, 1993, Operator offered 12 channels on the basic tier and 26 channels on the CPS tier. We have therefore entered those channel totals on FCC Form 393, Part I and Part II, Worksheet 1, Line 102, instead of the 13 channels on the basic tier and the 25 channels on the CPS tier shown by Operator. After making that adjustment, we found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price as of the initial date of regulation. Therefore, we find that Operator's actual CPS rate of $14.17 per month (plus franchise fee) was justified for the period from September 20, 1993 through September 30, 1993.

b. On October 1, 1993, Operator deleted HSN II from the CPS tier and added WQHS to the basic tier. Therefore, to derive the maximum permitted CPS rate for the period from October 1, 1993 through December 31, 1993, we rely on the Commission's rules then in effect[13] and reduce the number of channels on the CPS tier on Form 393, Part I from 26 to 25. This adjustment results in a maximum permitted CPS rate of $13.63 per month (plus franchise fee) for the period from October 1, 1993 through December 31, 1993.

c. On January 1, 1994, Operator moved WTBS from the CPS tier to the basic tier. Therefore, to derive the maximum permitted CPS rate for the period from January 1, 1994 through May 14, 1994, we rely on the Commission's rules then in effect and reduce the number of channels on the CPS tier on Form 393, Part I from 25 to 24. This adjustment results in a maximum permitted CPS rate of $13.08 per month (plus franchise fee) for the period from January 1, 1994 through May 14, 1994.

8. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period from October 1, 1993 through May 14, 1994. Operator's showing justifies maximum reasonable CPS tier prices of $13.63 per month (plus franchise fee) for the period from October 1, 1993 through December 31, 1993 and $13.08 per month (plus franchise fee) from January 1, 1994 through May 14, 1994.[14]

9. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the franchise area referenced in the caption, and all other complaints in this franchise area related to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the franchise area referenced in the caption that portion of the amount paid for cable programming service for the period from October 1, 1993 through December 31, 1993 which exceeded the maximum price of $13.63 per month (plus franchise fee) and for the period from January 1, 1994 through May 14, 1994 which exceeded the maximum price of $13.08 per month (plus franchise fee), plus interest to the date of the refund.

11. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

12. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the franchise area referenced in the caption, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price of $13.08 (plus franchise fee).[15]

13. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[13] 47 C.F.R. § 76.922(c) (1993) (amended, effective May 15, 1994).

[14] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Telerama, Inc. CUID No. OH0804
(Chagrin Falls)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: September 6, 1995; Released: September 12, 1995

By the Chief, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The complaint in the franchise area which is the subject of this Order was served on Operator and received by the Commission on February 25, 1994. Operator filed FCC Form 393 in response; Operator amended its justification on February 17, 1995, April 13, 1995, and May 26, 1995 in response to Commission letters which requested further clarification of Operator's showing.[11]

5. Operator restructured its rates on September 1, 1993 in an effort to comply with the Commission's rules. On October 1, 1993, Operator changed its service offerings by deleting HSN II from the CPS tier and adding WQHS to the basic tier. On January 1, 1994, Operator again changed its offerings by moving WTBS from the CPS tier to the basic tier. Despite these changes in Operator's channel line-up, Operator did not adjust its price for either its basic tier or its CPS tier.

6. Operator calculated a maximum permitted rate for its CPS tier of $13.69 per month (plus franchise fee). However, Operator's actual monthly charge was $14.34 (plus franchise fee). Thus Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. Upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations on Form 393:

a. In its Form 393 filings, Operator's calculations for its rate-regulated package as of the initial date of regulation (Form 393, Part II, Worksheet 1 and Form 393, Part I) do not count Channel 30 as a regulated satellite channel. Similarly, Operator's calculations for its rate-regulated tiers as of September 30, 1992 (Form 393, Part II, Worksheet 2) do not count Channel 29 as a regulated satellite channel. However, according to the channel line-ups provided by Operator, as of the initial date of regulation, Channel 30 carried both Bravo, a non-regulated pay-per-chan-

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Letter from Peter G. Wolfe, FCC, to Chad G. Hume, Cablevision (Feb. 13, 1995); letter from Peter G. Wolfe, FCC, to Chad G. Hume, Cablevision (Mar. 7, 1995); letter from Peter G. Wolfe, FCC, to Chad G. Hume, Cablevision (May 3, 1995).

nel service, for 76 hours per week and C-Span II, a regulated satellite service, for 92 hours per week. The same programming in the same proportion was carried on Channel 29 on September 30, 1992.

b. Our policy on "split" channels is to categorize them according to their preponderance of use. This policy is based on the fact that the 1992 price survey underlying the benchmark system was analyzed based on whole, not fractional, channel counts. Under the benchmark system in effect prior to May 15, 1994, all channels must be characterized as either rate-regulated or not subject to rate regulation and as either satellite or non-satellite. A "channel" is defined as a "unit of cable service identified and selected by a channel number or similar designation." FCC Form 393, p. 10. The preponderance of use test is the only method of classifying channels that is consistent with this conceptual framework.[12]

c. Under the preponderance of use test, the channels carrying both Bravo and C-Span II should have been classified as regulated satellite channels because C-Span II was shown the majority of the programming. Operator therefore should have counted Channel 30 as a regulated satellite channel on the CPS tier (Form 393, Part II, Worksheet 1 and Part 1) and Channel 29 as a regulated satellite channel on the basic tier (Form 393, Part II, Worksheet 2)[13]

d. Operator's calculations for its rate-regulated tiers as of the initial date of regulation (Form 393, Part II, Worksheet 1 and Form 393, Part I) count WTBS as a regulated satellite channel on the CPS tier. However, according to the channel line-ups submitted by Operator, WTBS was moved from the CPS tier to the basic tier before the filing of the first valid complaint in this franchise area. The channels used in completing Form 393 must be those channels offered on the initial date of regulation for each franchise area.[14] Since the change in the placement of WTBS occurred before any complaints were filed pertaining to this franchise area, that change must be reflected in the channel counts.

e. In order to correct the channel-counting errors discussed above, we increased the number of satellite channels used in calculating the benchmark on Form 393, Part II, Worksheet 2, Line 220 from 21 to 22, and we increased the number of regulated channels from 31 to 32. We also increased the number of channels on Form 393, Part II, Worksheet 2, Line 202A from 31 to 32. On Form 393, Part II, Worksheet 1, we increased the number of regulated channels and satellite channels used to calculate the benchmark on Line 121 from 31 to 32 and from 21 to 22, respectively. We also increased the number of channels on the basic tier on Line 102A from 10 to 11. These adjustments have the net effect of reducing the benchmark channel rates entered on Line 121 of Worksheet 1 and Line 220 of Worksheet 2 and decreasing the base rates per channel on Part II, Worksheet 1, Line 110 and Part II, Worksheet 2, Line 210.

f. In its Form 393 filing, Operator calculated the Inflation Adjustment Factor (Line 127, Worksheet 1, Part II) as of the end of May 1994 using data released by the U.S. Department of Commerce on March 31, 1994. However, Operator's use of May 1994 as the date through which it calculated the inflation adjustment is impermissible. Our rules require a cable operator to respond to a complaint that is not returned by the Commission within 30 days after the complaint is served.[15] Operator was, therefore, required to file a justification of its CPS price no later than March 28, 1994. If Operator had filed its justification in a timely fashion, the instructions to Form 393 would have required it to calculate the inflation adjustment only through February 1994. Operator cannot be permitted to claim an additional inflation adjustment simply because it filed Form 393 late. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date on which Operator should have filed.[16] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate 1.039 as the Inflation Adjustment Factor through February 1994, the base date Operator should have used in justifying its rate.

7. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $13.55 per month (plus franchise fee) for the period from February 25, 1994 to May 14, 1994.[17]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the franchise area referenced in the caption IS GRANTED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the franchise area referenced in the caption that portion of the amount paid for cable programming service for the period from Feb-

[12] See Viacom Cable, Nashville, Tennessee, CUID No. TN0148, DA 94-1151, at para. 6a-6c (Cab. Serv. Bur., released Nov. 9, 1994).

[13] Operator offered only a single tier of programming on this system on September 30, 1992. Channel 29 was part of this tier.

[14] *See* Viacom Cable, Nashville, Tennessee, *supra*.

[15] *See* 47 C.F.R § 76.956(a).

[16] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[17] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This

ruary 25, 1994[18] to May 14, 1994 which exceeded the maximum price of $13.55 per month (plus franchise fee), plus interest to the date of the refund.

10. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

11. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the franchise area referenced in the caption, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price of $13.55 (plus franchise fee).[19]

12. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[18] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[19] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 12, 1995

ONCOR FILES PETITION REQUESTING COMPENSATION FOR COMPETITIVE PAYPHONE PREMISES OWNERS AND PRESUBSCRIBED OPERATOR SERVICES PROVIDERS

Comments Due: October 2, 1995
Replies Due: October 16, 1995

Oncor Communications, Inc. ("Oncor") has filed a petition requesting that the Commission amend Section 64.1301 of the Commission's rules, 47 CFR Section 64.1301, to prescribe compensation for competitive payphone premises owners and presubscribed operator service providers ("OSPs") to offset their loss of revenue when callers choose to dial-around a payphone's presubscribed OSP. Oncor notes that the Commission currently requires certain interexchange carriers to compensate competitive payphone owners on a flat-rate basis for originating interstate access code (10XXX or 1-800) calls.

In support of its petition, Oncor argues that "a consideration of the equities demonstrate[s] that a compensation mechanism is necessary in order to remedy the injustices resulting from access code calls." Oncor further argues that both the premises owners and the presubscribed OSPs increase the availability and access to payphone use by providing constant reliable service regardless of whether a caller places a call that generates revenue for either party.

Parties wishing to comment on this matter may file their comments on or before **October 2, 1995**. Reply comments may be filed on or before **October 16, 1995**. All filings concerning this matter should refer to ENF 95-016. Copies of the petition and any subsequently filed documents in this matter may be obtained from ITS, Inc., 2100 M Street, NW, Suite 140, Washington, DC 20037, (202) 857-3800. The petition and other documents are also available for inspection and copying in the Public Reference Room, Plaza Level, 1250 23rd Street, NW, Washington, DC 20554.

For further information, contact Michael Carowitz at (202) 418-0960.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of CanXus
Broadcasting Corporation,
Licensee of Radio
Station WCXU-FM, Caribou, Maine

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1995; Released: September 12, 1995

By the Commission:

1. The Commission has under consideration (1) a *Memorandum Opinion and Order* (*"MO&O"*) released on June 28, 1993, 8 FCC Rcd 4323 (MMB 1993), reducing from $10,000 to $1,000 a forfeiture imposed against CanXus Broadcasting Corporation ("CanXus"), licensee of Radio Station WCXU-FM, Caribou, Maine, by a *Forfeiture Order*, 7 FCC Rcd 3874 (MMB 1992),[1] and (2) an Application for Review of the *MO&O* filed by CanXus on July 28, 1993.

2. The forfeiture was assessed for CanXus's apparent violation of Section 310(d) of the Communications Act of 1934,[2] as amended, and Section 73.3540 of the Commission's Rules,[3] in connection with CanXus's unauthorized assumption of control over Station WKZX-AM, Presque Isle, Maine. The facts are set forth in full detail in the *NAL* and the *Forfeiture Order* and will be repeated here only briefly.

3. Beginning in August 1987, CanXus and the licensee of WKZX, Colonial Broadcasting Company ("Colonial"), entered into a series of interrelated agreements concerning the operation of Station WKZX. The Mass Media Bureau found that these agreements, taken together and when viewed along with the actual day-to-day operation of the Station subsequent thereto, resulted in a de facto transfer of control of the station license to CanXus prior to obtaining Commission consent to such a transfer.

4. The first of the agreements entered into between CanXus and Colonial was a "memorandum of understanding" dated August 29, 1987, and signed by the parties on August 31, 1987. This letter agreement reflected a series of understandings agreed to by Dennis Curley, President and principal owner of CanXus, and J. Gregory Freeman, President and principal owner of Colonial, at a meeting held on August 27, 1987. The memorandum of understanding provided that CanXus would purchase Station WKZX-AM from Colonial for a specified sum and under specific terms set forth therein.[4] It also provided that as of September 1, 1987, CanXus would undertake certain aspects of the operation of Station WKZX-AM, including responsibility for all of Station WKZX's contractual and financial obligations. Additionally, CanXus and Colonial agreed in the memorandum of understanding that "[a]s of Sept. 1, 1987, all employees of WKZX will be terminated by Colonial," and that thereafter, "Canxus will offer employment to selected WKZX personnel for operational and sales functions." A separate programming services agreement signed the same day by Colonial and CanXus stated that CanXus would provide programming for broadcast by Station WKZX starting September 1, 1987, and the parties intended that this programming would consist primarily of simulcasting CanXus's WCXU-FM programming over WKZX-AM. A third agreement, also signed August 31, 1987, appointed CanXus President Dennis Curley as Vice President of Colonial Broadcasting Corporation and General Manager of Station WKZX. A fourth agreement (this one oral) made the same day provided that CanXus would immediately undertake the joint sales of advertising for both WKZX and WCXU. On September 1, 1987, Colonial did in fact terminate all its employees (other than Curley), and began simulcasting the WCXU programming over WKZX.

5. The *NAL* released September 19, 1991, found that CanXus, through these agreements and through the course of its actual operation of Station WKZX, had assumed control of WKZX without prior Commission approval. The *NAL* proposed a forfeiture of $10,000 for this violation. This preliminary conclusion and forfeiture amount were adopted in the *Forfeiture Order* released June 16, 1992, 7 FCC Rcd 3874 (MMB 1992). A further *Memorandum Opinion and Order*, 8 FCC Rcd 4323 (MMB 1993), denied CanXus's request for reconsideration of the holding that an unauthorized transfer of control had taken place. However, that *MO&O*, which is the subject of CanXus's present Application for Review, did reduce the forfeiture amount from $10,000 to $1,000, based on the conclusion that the

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[1] The *Forfeiture Order* imposed the penalty proposed in a *Notice of Apparent Liability for a Forfeiture*, 6 FCC Rcd 5399 (MMB 1991) (*"NAL"*).

[2] Section 310(d) of the Communications Act states, in relevant part:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

[3] Section 73.3540(a) of the Commission's Rules states that "[p]rior consent of the FCC must be obtained for a voluntary assignment or transfer of control."

[4] The August 31, 1987, memorandum of understanding agreement also provided that a more detailed Purchase and Sale Agreement would be drafted forthwith governing the sale of the Station to CanXus. Such a Purchase and Sale Agreement, incorporating essentially the same financial terms as those set forth in the memorandum of understanding, was executed by the parties on January 18, 1988, and was filed along with an assignment of license application on January 25, 1988. See FCC File No. BAL-880125EA. A Petition to Deny the assignment application was filed on March 3, 1988, by Four Seasons Communications, Inc. This assignment application was voluntarily dismissed at the request of the parties filed April 25, 1989.

violation by CanXus was minor when viewed in the context in which it had occurred, and that it resulted primarily from inadvertent mistakes committed while attempting to save a station in severe financial distress. Now, by letter filed with the Commission on July 28, 1993, CanXus seeks review of the *MO&O* to the extent that it found that CanXus had violated the rule against transfer of control of a station license without prior authorization.

6. The Application for Review contends that the Bureau, in concluding that an unauthorized transfer of control had taken place, had failed to give adequate credit to what CanXus contends were two "major safeguards preventing transfer/assignment of [ultimate] control." These alleged safeguards were, first (as the Bureau's *NAL* allegedly had "conceded"), "Colonial Broadcasting Company did not relinquish control of WKZX's programming," and second, that "[n]one of the real or personal property of Colonial Broadcasting Company [WKZX] were ever assigned or transferred to CanXus." In addition, CanXus faults the Bureau for "hold[ing] CanXus responsible for the termination of the staff of WKZX from the payroll of the Colonial Broadcasting Company, even though the Commission repeatedly acknowledges that said action was taken by Colonial - not CanXus." CanXus also asserts that the Bureau was incorrect to conclude that the finances of Colonial and CanXus were blended to the point of being "indistinguishable"; it further asserts that the financial arrangements did not differ significantly from joint sales or time brokerage agreements that have subsequently been permitted by the Commission. Finally, CanXus contends that the forfeiture imposed is barred by the time limitations set forth in Section 503(b)(6) of the Communications Act.

7. Section 1.115(b)(2) of our Rules requires that an application for review "shall specify with particularity, from among the following, the factor(s) which warrant Commission consideration of the questions presented." The rule then lists five grounds that may be used for seeking review:

> (i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.
>
> (ii) The action involves a question of law or policy which has not previously been resolved by the Commission.
>
> (iii) The action involves an application of a precedent or policy which should be overturned or revised.
>
> (iv) An erroneous finding as to an important or material question of fact.
>
> (v) Prejudicial procedural error.

47 C.F.R. § 1.115(b)(2). The instant Application for Review is procedurally deficient because it fails to set forth which of the above factors it relies on as a basis for Commission consideration of the questions presented. It merely states, in a conclusory manner, that the Bureau's overall conclusion drawn from the various facts is wrong, in view of the two "safeguards" against a transfer which it claims were in place. No citation is made to any Commission ruling or precedent which contradicts the Bureau's findings, or which suggests that under the facts of this case, no transfer took place. Such a broad claim of error is deficient in that it fails to direct the Commission to particular respects in which the decision made by the delegated authority is allegedly incorrect.

8. Nevertheless, addressing the substance of CanXus's Application for Review, we agree with the Mass Media Bureau that the evidence before it demonstrated that CanXus had assumed control of Station WKZX without Commission authorization. CanXus's contention that the two "safeguards" that were employed -- Colonial's retention of legal title to real and personal property and its limited continued involvement in programming -- effectively prevented a transfer of control from taking place is wrong factually, and in any event ignores the standards the Commission has set forth for determining whether an unauthorized transfer of control has taken place. First, CanXus is incorrect in its factual premise that "[n]one of the real or personal property of Colonial . . . were ever assigned or transferred to CanXus." Although the physical plant was not transferred to CanXus, CanXus was given full authority to use those physical assets, including all studio and transmitter equipment, in operating WKZX. Such authority is indistinguishable from a lease for such equipment. In addition, Colonial's personal property included leases and other agreements that Colonial had entered into with third parties, all of which were assumed by CanXus as of September 1, 1987.[5] Thus it is inaccurate to maintain that Colonial did not transfer title to any station property to CanXus.

9. In addition, from the start of the relationship between Colonial and CanXus, the majority of WKZX's programming was produced by CanXus employees at WCXU's studios and simulcast over WKZX, and by the later portion of CanXus's management of the station, the WKZX studios were essentially closed down, with the WKZX transmitter being operated by remote control from the WCXU studios. Thus the status of legal title to the unused WCXU physical plant is of little significance in determining control of the station.

10. Moreover, while it may be true that legal title to the physical assets of the station was never formally transferred, the Commission has held that this factor is not dispositive in determining whether an unauthorized transfer has occurred. Rather, in making such determinations, the Commission traditionally looks beyond legal title and examines who actually controls the station finances, personnel matters, and programming. *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981). Accordingly, in issuing the *NAL*, the Mass Media Bureau properly looked beyond the legal title to WKZX's assets and examined the conduct of Colonial and CanXus in the overall context of their agreements and their ongoing conduct.

11. With respect to the programming of WKZX, CanXus in its Application for Review substantially overstates the Bureau's conclusions by suggesting that the Bureau had "conceded" that Colonial "did not relinquish control of

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[5] Further, although the August 31, 1987, letter agreement provided that CanXus would collect Colonial's accounts receivable for payment to Colonial, the parties by an October 13, 1987, amendment to the letter agreement, deferred any repayment of such collected accounts receivable to Colonial until after the assignment was consummated. It is unclear whether any of such receivables (Colonial's personal property) collected by CanXus were ever paid to Colonial.

WKZX's programming." Rather, the *NAL* found only that Colonial's President maintained some minimal, sporadic involvement in programming decisions, even though CanXus provided most of WKZX's programming and CanXus's President made significant changes in the programming, including a change of radio network affiliation from ABC to NBC. The *NAL* concluded that while the issue of programming content was not sufficient, in itself, to establish an unauthorized transfer of control, "when viewed in the overall context of the agreements between Colonial and CanXus, some portions of which clearly demonstrate an abdication of control by Colonial, *the programming agreement supports a finding that an unauthorized assignment occurred.*" 6 FCC Rcd at 5400 (emphasis added). This conclusion -- that the extensive control exercised by CanXus over WKZX's programming contributes to the finding that an unauthorized transfer of control has taken place -- is well supported by the evidence before the Commission.

12. With respect to the station's personnel, CanXus focuses on the fact that Colonial's President was the individual who actually told the Colonial employees that they were terminated on August 31, 1987. This focus is misdirected. This single act alone does not demonstrate that Colonial maintained control over WKZX's personnel. More significant is the fact that the determination to terminate all WKZX employees was dictated by the August 31, 1987, letter agreement between CanXus and Colonial as a material term of their agreement. More significant still is the fact that after Colonial fired all of its employees, CanXus would, in its discretion, rehire certain of them to operate the Station. Indeed, after the termination of all of Colonial's WKZX employees, the only *Colonial* employee was CanXus President Dennis Curley, who became Vice President of Colonial and General Manager of WKZX. While it is unclear whether Curley was paid a "salary" by Colonial after August 31, 1987, all other employees who were involved in any operations relating to Station WKZX were paid by CanXus with CanXus checks. These facts demonstrate that CanXus had assumed virtually complete control over the personnel of Station WKZX; the fact that it was Colonial's President who communicated to the WKZX employees the joint CanXus/Colonial decision to terminate them is of little, if any, significance in these circumstances.

13. CanXus's further contention that CanXus did not control the Station's finances is also plainly incorrect. The *Forfeiture Order* had found that the finances of Station WKZX and CanXus's Station WCXU had been blended to the point that they were indistinguishable, and that CanXus actually had "overwhelming financial control over WKZX." 7 FCC Rcd at 3874. CanXus suggests that these conclusions are contradicted by the fact that Colonial continued to pay its own mortgage, insurance, and taxes on its real property, and that the commingling of advertising revenues is typical of many joint sales or local marketing agreements that have been permitted by the Commission. While Colonial may have paid its mortgage and real estate taxes, all other "ongoing" financial obligations of Station WKZX -- including taxes, utility bills, payroll, payroll taxes, and insurance -- were assumed by CanXus as of August 31, 1987, pursuant to the letter agreement signed on that date. Additionally, the proposed analogy to joint sales or local marketing agreements is misplaced; the only such arrangements that have been affirmatively approved by the Commission involved those which have been undertaken pursuant to written agreements which set forth specific limits on the control which may be exerted by the broker and which retain the licensee's ultimate control over the programming, personnel, and finances of the station. As set forth above and in greater detail in the *NAL*, the various agreements executed by CanXus and Colonial did not provide for such licensee control to be retained by Colonial in this case, and in practice, CanXus assumed virtually complete control over the operation of the Station. We affirm the Bureau's finding that there was an unauthorized assumption of control over the station by CanXus that started on August 31, 1987, and continued until the station went off the air in October 1989.

14. As a final matter, we reject CanXus's contention that the Commission's imposition of a forfeiture against WCXU is barred by the statute of limitations set forth in 47 U.S.C. § 503(b)(6).[6] CanXus's involvement in the operation of Station WKZX began in August 1987, and apparently ended on October 31, 1989. The *NAL* against WCXU was issued on September 19, 1991. The applicable limitations provision in effect in September 1991 allowed the Commission to issue a forfeiture penalty against a licensee as long as a notice of apparent liability was issued within three years of the occurrence of the violation. The shorter limitations period of one year, which CanXus argues should apply to its advantage, is reserved for the situation in which a license renewal occurs before the notice of apparent liability is issued and the violation has thus occurred in a *previous* license term. That is not the case here. The license had not yet been issued[7] and consequently had not been renewed between the violation and the issuance of the *NAL*. Therefore, the Commission had authority to issue a notice of apparent liability for violations occurring up to three years prior to the September 1991 *NAL*, that is, for

[6] Section 503(b)(6) as in effect at that time provided:

No forfeiture penalty shall be determined or imposed against any person under this subsection if--

(A) such person holds a broadcast license issued under title III of this Act and if the violation occurred--

(i) more than 1 year prior to the date of issuance of the required notice or notice of apparent liability; or

(ii) prior to the date of commencement of the current term of such license,

whichever is earlier so long as such violation occurred within 3 years prior to the date of issuance of such required notice . . . . In 1993, Congress amended the statute to extend the limitations period for issuing forfeitures to broadcast licensees. The statute now encompasses the entire license term. This change in the limitations period does not affect the outcome of the instant case because the *NAL* was issued in 1991 under the previous statute, as quoted above.

[7] WCXU's initial license to cover its construction permit was granted on October 28, 1991. From the time the station went on the air in 1986 until this license application was granted, WCXU was operating under its construction permit pursuant to program test authority as provided by Section 73.1620 of the Rules.

violations occurring after October 1988, which includes the final year of CanXus's operation of WKZX. Accordingly, the *NAL* was timely issued.

15. Accordingly, IT IS ORDERED that the Application for Review filed by CanXus Broadcasting Corporation IS DENIED and that it, as licensee of Radio Station WCXU-FM, Caribou, Maine, SHALL FORFEIT to the United States the sum of One Thousand Dollars ($1,000) for the willful and repeated violation of 47 U.S.C. Section 310(d) and 47 C.F.R. Section 73.3540. Payment of the forfeiture may be made in accordance with the instructions previously provided.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

SPANISH RADIO NETWORK

For Transfer of Control of

WQBA(AM), Miami, Florida	File No. BTC-931216HK
WQBA(FM), Miami, Florida	File No. BTCH-931216HL
WGLI(AM), Babylon, New York	File No. BTC-931216HN
WADO(AM), New York, New York	File No. BTC-931216HM

LICENSEE CORPORATION #1

For Transfer of Control of
WAQI(AM), Miami, Florida File No. BTC-940815EC

LICENSEE CORPORATION #2

For Transfer of Control of
WRTO(FM), Goulds, Florida File No. BTCH-940815GF

MEMORANDUM OPINION AND ORDER

Adopted: August 10, 1995; Released: September 12, 1995

By the Commission:

1. The Commission has under consideration: (1) the Letter of Larry D. Eads, Chief, Audio Services Division, to David Honig, *et al.*, dated August 10, 1994 (hereafter the "*Honig Letter*"), granting the application for transfer of control of Spanish Radio Network ("SRN"), licensee of Stations WQBA(AM) and WQBA(FM), Miami, Florida, WGLI(AM), Babylon, New York, and WADO(AM), New York, New York, from Mark Blank, Tony Blank, Herbert M. Levin, Robert Frehling, Russell Frehling, Kathy Kramer, and Broadcast Holdings, Inc., to HBC Florida, Inc. ("HBC"), a wholly-owned subsidiary of Heftel Broadcasting Corporation ("Heftel"); (2) an Application for Review of that decision filed September 9, 1994, by Cambio Cubano, Professionales y Empressarios Cubano Americanos (PECA/CAPE), and Sepia Fine Graphic Arts, Inc. d/b/a/ *Contrapunto* Magazine (collectively, the "Miami Petitioners");[1] (3) an Opposition to Application for Review filed September 26, 1994, by HBC; (4) a letter dated September 29, 1994, filed by Licensee Corporation #1, licensee of Station WAQI(AM), Miami, Florida, relating to allegations made in the Petition to Deny against that station; (5) the Letter of Larry D. Eads, Chief, Audio Services Division, to Francisco R. Montero, *et al.*, dated May 4, 1995 (hereafter the "*Montero Letter*"), granting the application for transfer of control of Licensee Corporation #1, licensee of Station WAQI(AM), Miami, Florida, and of Licensee Corporation #2, licensee of Station WRTO(FM), Goulds, Florida (Licensee Corporation #1 and Licensee Corporation #2 are sometimes collectively referred to hereafter as "Corporations"), from Mambisa Broadcasting Corporation ("Mambisa") to Heftel Broadcasting Corporation ("Heftel"; HBC and Heftel are generally referred to collectively as "Heftel" herein); (6) an Application for Review of the *Montero Letter* filed June 5, 1995, by Cambio Cubano, Professionales y Empressarios Cubano Americanos (PECA/CAPE), and Sepia Fine Graphic Arts, Inc. d/b/a/ *Contrapunto* Magazine (these are the same groups identified above as the "Miami Petitioners"); (7) an Opposition to Application for Review filed June 21, 1995, by Heftel Broadcasting Corporation; and (8) an Opposition to Application for Review filed June 20, 1995, by Mambisa Broadcasting Corporation.

2. These cases, involving two separate radio station transactions with a common buyer, have been consolidated by the Commission because they raise nearly identical issues with respect to the various Miami-area stations involved in these transfers of control. In the first case, involving, *inter alia*, Stations WQBA(AM)/WQBA(FM), the Miami Petitioners seek review of the *Honig Letter's* denial of their Petition to Deny the referenced applications for transfer of control of SRN to Heftel. In the second Application for Review, involving Stations WAQI(AM) and WRTO(FM), the Miami Petitioners seek review of the *Montero Letter's* denial of their Petition to Deny the applications for transfer of control of Licensee Corporation #1 and Licensee Corporation #2 from Mambisa to Heftel. In both cases,[2] the Miami Petitioners maintain principally: (1) that the acquisition of control of SRN by HBC/Heftel, in combination with the existing and proposed increased ownership by Heftel in the Corporations, would violate the Commission's local radio ownership rules; (2) that one of the stations in which Heftel held a minority ownership interest had violated the personal attack rule; and (3) that this other station in which Heftel held a minority interest had engaged in an incitement to violence against opponents of viewpoints espoused by that station. For the reasons set forth below, the two Applications for Review are denied and the actions granting the referenced transfer of control applications are affirmed.

3. *Multiple Ownership.* Heftel currently holds an attributable ownership interest in Stations WAQI(AM), Miami, and Station WRTO-FM, Goulds, Florida.[3] With the addi-

[1] Cambio Cubano describes itself as a South Florida membership organization supporting pacifist solutions to the transition to Cuban democracy. Professionales y Empressarios Cubano Americanos (PECA/CAPE) describes itself as a South Florida membership organization interested in conducting lawful business with Cuba and organized to seek changes in the law to allow it to do so. Miami Petitioners describe *Contrapunto* as a Spanish language South Florida magazine published by Sepia Fine Graphic Arts, Inc., containing articles on politics, art and tourism directed to the Latin and Cuban community.

[2] Miami Petitioners have incorporated by reference the WQBA Application for Review into the WAQI Application for Review.

[3] Heftel is the 49 percent general partner of Viva Broadcasting ("Viva"). Viva, in turn, is the parent of Licensee Corporation #1, which operates WAQI through Viva's 51 percent managing general partner, Mambisa Broadcasting Corporation. Licensee

tion of SRN's Miami facilities, Heftel claims it will have a combined audience share of 13.3 percent in the Arbitron Miami-Ft. Lauderdale-Hollywood Metro Market, less than the 25 percent limit specified in 47 C.F.R. §73.3555(a)(1)(ii), the relevant local radio ownership rule. Miami Petitioners, however, would define the market for purposes of the rule as the "Spanish radio market," or "persons for whom Spanish is the primary language." Based on consideration of only the Spanish language stations in the relevant service area, Miami Petitioners claim that the proposed transferee would have a combined 58.3 percent share.

4. In support of their contention that the Commission's analysis for compliance with the radio ownership rule should be confined only to the "Spanish radio market," Miami Petitioners argue that for local Spanish speakers and for political and commercial advertisers seeking to reach them, Spanish radio is the only meaningful broadcast choice. According to Miami Petitioners, Spanish radio is not a format, and consumer behavior and political goals of Spanish speakers differ significantly from those of the general population. Miami Petitioners claim that a combination of the four Miami area stations in question could determine the tone of political dialogue in the Spanish-speaking community and would be "inherently anticompetitive" and violative of the letter and spirit of the local radio ownership rules.

5. Miami Petitioners argue that the ownership rules provisions are designed to protect the public from concentration such as that which allegedly would occur here. Citing *Revision of Radio Rules and Policies* (*"Radio Rules"*), 7 FCC Rcd 2755, 2780, §50 (1992), they assert that these provisions are designed to reach beyond ordinary antitrust concerns, because they are also designed to promote a distinct objective, a diversity of voices. Miami Petitioners claim that the relevant market here can appropriately be defined by language, referencing wording in *Revision of Radio Rules and Policies* (*"Radio Rules Reconsideration"*), 7 FCC Rcd 6387, 6398, ¶ ¶52 and 55-56 (1992), which they characterize as indicating that the Commission has provided for a "wide range" of market definitions. Miami Petitioners argue that the Commission has recognized that persons unable to communicate in English constitute a broadcast market separate from those who speak English, and contend that the Commission's decision in *Fox Television Stations, Inc.*, 8 FCC Rcd 3213 (1993) (*"Fox"*), involving the distant signal importation rule, demonstrates that language comprehensibility is critical to market definition. According to Miami Petitioners, the local radio ownership rules involve a goal analogous to that of the distant signal importation rule, and thus *Fox* requires the Commission to consider language comprehensibility in defining the market in evaluations involving the local radio ownership rules.

6. In its Oppositions to the two Applications for Review, Heftel argues that Miami Petitioners fail to cite any rule or precedent allowing use of an alternative market based on language for determining concentration for purposes of the local radio ownership provisions. According to Heftel, the reference to alternative data in paragraphs 52, 55, and 56 of *Radio Rules Reconsideration* is limited to situations where Arbitron data is anomalous or unreliable, and, contrary to Miami Petitioners' contention, the note to §73.3555(a)(1)(ii) does not otherwise sanction the use of alternative data. Heftel further argues that use of alternative market definitions based on format is inherently unreliable and contrary to Commission goals.

7. *Discussion.* We reject Miami Petitioners' contention that only Spanish language stations should be considered in determining the combined audience share of the stations that would be attributable to Heftel for the purpose of compliance with the ownership rules. Section 73.3555(a)(1)(ii) of the Commission's Rules, 47 C.F.R. § 73.3555(a)(1)(ii), provides as follows:

> In radio markets with 15 or more commercial radio stations, a party may own up to 2 AM and 2 FM commercial stations, provided, however, that evidence that grant of any application will result in a combined audience share exceeding 25 percent will be considered *prima facie* inconsistent with the public interest.[4]

It is true that the Commission, in adopting this 25 percent audience share limit, intended to protect and promote a diversity of media voices. However, there is nothing either in the express language of the rule quoted above, in *Radio Rules*, or in *Radio Rules Reconsideration*, to indicate that the goal of enhancing diversity is furthered by defining the relevant market in terms of the languages in which radio stations broadcast. Insofar as the Commission provided for the submission of alternative audience data in paragraphs 52 and 55-56 of *Radio Rules Reconsideration*, the clear language set forth therein limits consideration of such alternative data to situations where standard audience share data is not readily available or does not accurately show that excessive concentration will not exist.[5] Miami Petition-

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Corporation #2, the licensee of WRTO, has the same ownership as Licensee Corporation #1. Subsequent to the filing of the SRN transfer of control application on December 16, 1993, applications were filed on August 15, 1994, proposing the transfer of control of Licensee Corp. #1 and Licensee Corp. #2 from Mambisa Broadcasting Corporation to Heftel Broadcasting Corporation, and Miami Petitioners filed their second Petition to Deny against that application on September 29, 1994, in large part incorporating by reference the earlier Petition to Deny against WQBA.

[4] The following note to this provision is also relevant here:

> Note to paragraph (a)(1)(ii): When evaluating audience share evidence submitted under §73.3555(a)(1)(ii), the Commission will consider data that eliminates statistical anomalies, provides a better focused survey area or includes revenue data or other relevant information. Where applicants certify that they do not have readily available audience share data, they may substitute other information that can serve as a proxy for such data. *See Memorandum Opinion and Order* in MM Docket No. 91-140, 7 FCC Rcd 6387 (1992), 57 FR 42701 (Sept. 16, 1992).

[5] The Commission's discussion, at paragraph 52 of *Radio Rules Reconsideration*, of the circumstances under which alternative audience share data may be considered (including language omitted by Miami Petitioners' in their quotation at page 4 of their Application for Review) makes clear the limited nature of this option:

> *To the extent that petitioners are concerned that Arbitron's measuring tools may be too rough-hewn and thus may unfairly foreclose them from acquiring stations due to inaccuracies in the data, we note that* applicants will be free to

ers' desire in the present case to limit the market to Spanish language stations goes far beyond the limited nature of the alternative data exception outlined in *Radio Rules Reconsideration*, in a manner clearly beyond that contemplated by the Commission's rules.

8. Miami Petitioners' arguments that non-English speakers constitute a distinct broadcast market and that Spanish programming serves the public interest are not dispositive for purposes of evaluating the instant transfer applications under the multiple ownership rules. Although Spanish speakers may be perceived by those seeking to reach them as a distinct market, the multiple ownership rules are not geared toward such a market definition. Neither the plain language of Section 73.3555 nor the pronouncements in *Radio Rules* and *Radio Rules Reconsideration* address consideration of a market defined by language. Rather, the rule is crafted in terms of an entire broadcast "audience," including both Spanish speakers and others. Indeed, the rule itself does not use the term "market" in the same sense as that term is used in other contexts;[6] rather, Section 73.3555(a)(1)(ii) refers instead to "audience share," which in turn is defined in Section 73.3555(a)(3)(iii) as the average number of persons "who listen to the station, expressed as a percentage of the average number of persons listening to AM and FM stations in that radio metro market or a recognized equivalent, in which a majority of the overlap between the stations in question takes place." "Radio metro market" is a standard term used by Arbitron to delineate stations appearing in diaries in a specific geographical area, and does not include a distinction based on language.

9. Moreover, most larger radio metro markets include at least one or more foreign language stations. It would involve a substantial rewriting of the present rules to require, in each specific local ownership rule evaluation, that the stations considered in evaluating audience share be segregated into English-language stations on the one hand, and Spanish-language stations on the other. By Miami Petitioners' reasoning, an existing licensee's acquisition of another English-language station would analogously require the exclusion from consideration of all Spanish language stations. And in markets with only two or three Spanish language stations (unlike Miami where there are more than seven such stations), there would be virtually no situation where common ownership would be permitted. Further, Miami Petitioners' desire to segregate the radio metro market for ownership purposes into Spanish-language and English-language stations might allow the acquisition of a Spanish station by the owner of an English station where the combined audience share exceeded 25 percent. These results clearly were not intended by the current rule. Insofar as Miami Petitioners would have the rule recast so as to prohibit broadcast concentration in a market defined by language comprehension, the appropriate course of action is to request that the Commission institute a generic rule making proceeding to change its current multiple ownership rules and policies. *See Patteson Brothers, Inc.*, 8 FCC Rcd 7595, 7596 (1993).

10. We also agree with the *Montero Letter's* conclusion that the local ownership compliance determination made in the prior *Honig Letter* is not changed by the filing of the second set of applications whereby Heftel would move from minority to majority ownership of WAQI and WRTO. Although Heftel claims that it was not previously involved in the day-to-day operations of WAQI and WRTO, its previous 49 percent general partnership interest was treated as fully attributable under the Commission's attribution rules, not because of the percentage of ownership interest involved but because of the character of a general partner's rights and prerogatives in a partnership. *See* 47 C.F.R. § 73.3555 note 2. The attribution rules assume, essentially, that the maximum degree of control possible arises from any general partnership interest, regardless of the specific practices by which an individual partnership actually operates. Heftel's proposed majority ownership does not substantially alter the treatment of its interests in WAQI and WRTO for purposes of the multiple ownership rules. Thus the proposed acquisition of control of WAQI/WRTO by Heftel does not require any modification of the conclusions reached in the *Honig Letter*. For these reasons, we deny review of the *Honig Letter* and the *Montero Letter* with respect to the multiple ownership issues.

11. *Personal Attack and Incitement to Violence Allegations.* Miami Petitioners alleged that WQBA and WAQI[7] have "repeatedly" violated the personal attack rule and have contributed to a "climate of political violence." These personal attacks, it is said, have usually consisted of accusations that those who are not sufficiently in opposition to

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submit additional showings demonstrating compliance with the share limit based on more accurate survey methods or the alternative measures of market share described below.

7 FCC Rcd at 6398 (emphasis added to show language omitted by Miami Petitioners; footnote omitted). Similarly, the language omitted by Miami Petitioners from their quotation of paragraph 56 of *Radio Rules Reconsideration* also is significant in demonstrating the limited nature of the alternative data option:

> . . . *we acknowledge that there may be situations where applicants can* provide data that eliminates statistical anomalies, provides a better focused survey area or includes revenue data or other information *proving* that excessive concentration will not result.

Id. at 6399 (emphasis added to show language omitted).

[6] For this reason, Miami Petitioners' reliance on *Fox Television Stations, Inc., supra*, 8 FCC Rcd 3213, for the proposition that the Commission has recognized that language comprehensibility is critical to market definition, is misplaced. In *Fox*, the Commission simply held that "a change from Spanish to English language is the sort of fundamental operational change which warrants treating the station as essentially 'new' for the purposes of establishing significantly viewed status." *Id.* at 3214. The Commission did not imply that the agency would use language as a means of market definition to determine compliance with the multiple ownership rules. While in some broad sense the significantly viewed signal carriage rule and the local radio ownership rules may share the common "goal" of increasing diversity, the purpose of the *Fox* ruling itself was limited to a recognition that the change in spoken language may affect the viewing patterns for such a station. There is no basis for imputing a broader meaning to that limited ruling so as to justify the division of all types of "markets" into language-based dual markets.

[7] As noted above at footnote 3, prior to the filing of the applications at issue in this proceeding, Heftel held no interest in WQBA(AM)/(FM). Heftel did hold a minority ownership interest in, but claims not to have exercised control over, WAQI, which was licensed to Licensee Corporation #1.

the regime in Cuba are suspect or are traitors to the cause of Cuban democracy. Moreover, according to Miami Petitioners, the targets were seldom afforded opportunities to respond. Miami Petitioners also alleged that certain broadcasts led to "mob violence" against parties opposing the prevailing hard line policies directed against the Castro regime.

12. The *Honig Letter* rejected Miami Petitioners' allegations that WAQI and WQBA violated the personal attack rule. First, the *Honig Letter* found that Miami Petitioners failed to present evidence that the alleged personal attacks took place during a discussion of a controversial issue of public importance. Second, the *Honig Letter* found that the Miami Petitioners' claim was undermined by the fact that none of the persons identified as targets of the personal attacks contacted the stations to invoke their rights under the personal attack rule, noting that the Commission generally does not entertain a personal attack complaint where the complainant has not first contacted the station and afforded the station an opportunity to respond. Third, with respect to the contention that the allegedly inflammatory broadcasts on WQBA and WAQI incited "mob violence," the *Honig Letter* found that the Commission was constrained, in light of First Amendment concerns, from taking action against the stations without a prior finding by local authorities that such broadcasts presented a "clear and present danger" to those allegedly attacked.

13. Miami Petitioners in seeking review contend first that the *Honig Letter* failed to recognize that the "issue of Cuban-American relations" is "controversial" and an "issue of public importance." Second, Miami Petitioners dispute that the targets of the alleged personal attacks must first contact the stations before complaints would be considered by the Commission. Third, with respect to the incitement to violence complaint, they contend that the Commission should not require that a local court make a determination that the referenced broadcasts did, in fact, constitute a "clear and present danger" to those attacked before taking action against the licensee.

14. *Discussion.* We affirm the *Honig Letter's*, and thus the *Montero Letter's*, rejection of the Miami Petitioners' personal attack claims. Section 73.1920 of the Commission's Rules provides that, "(w)hen, during the discussion of a controversial issue of public importance, an attack is made upon the honesty, character, integrity, or like personal qualities of an identified person or group," the licensee must notify the subject(s) of the attack and afford them an opportunity to respond on the station. However, as recognized by the Court of Appeals for the District of Columbia Circuit,

> Both Fairness Doctrine and Personal Attack rule complaints must present prima facie evidence of a violation before the Commission will require the broadcaster to respond. See American Security Council Educational Foundation v. FCC, 607 F2d [438,] 445 [(D.C. Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980)]. Among other requirements, the complaint must show that a controversial issue of public importance has been discussed. Id. at 445-47.

Anti-Defamation Ass'n of Emigres from Post-1917 Russia v. FCC, No. 86-1169, 63 R.R.2d 1425, 1427 (D.C. Cir. June 30, 1987).[8]

15. Although Miami Petitioners make the broad claim that the *Honig Letter* erroneously held that "Cuban-American relations" is not a "controversial issue of public importance," no such conclusion appears in the Decision. Rather, the *Honig Letter* correctly held that Miami Petitioners "*presented no evidence to demonstrate* that any issue discussed was the subject of vigorous debate with substantial elements of the community in opposition to each other" (emphasis added), citing *Fairness Doctrine and Public Interest Standards*, 48 FCC 2d 1 (1974), *recon. denied*, 58 FCC 2d 691 (1976), *aff'd in part and remanded in part on other grounds sub nom., National Citizens Committee for Broadcasting v. FCC*, 567 F. 2d 1095 (D.C. Cir. 1977), *cert. den.*, 436 U.S. 926 (1978). *See also Amendment of Part 73 of the Rules, Personal Attacks and Political Editorials*, 8 FCC 2d 721, 725 (1967). The Commission will not merely assume that an alleged attack was made during a discussion of a controversial issue of public importance; rather, the complaint must contain a clear statement of what issue was being discussed when the attack was made and a specific showing that the issue is both controversial and a matter of substantial, vigorous public debate. *See Pacifica Foundation*, 95 FCC 2d 750, 757 (1983); *Roger Langley*, 45 R.R.2d 1679, 1681 (1979), *citing Broadcast Procedure Manual*, 49 FCC 2d 1, 6 (1974); *Dontron, Inc.*, 6 FCC Rcd 2560, 2562 (MMB 1991); *Avery D. Post v. CBS, Inc.*, 55 R.R.2d 1361, 1363 (MMB 1983), *rev. denied*, 55 R.R.2d 1357 (1984). Moreover, the Commission has stated that, "an issue is not necessarily a matter of significant 'public importance' merely because it has received broadcast or newspaper coverage." *Fairness Doctrine and Public Interest Standards*, *supra*, 48 FCC 2d at 11. The *Honig Letter* also was correct in its holding that the Miami Petitioners failed to present evidence demonstrating the likely impact of the issue on the Dade and Broward County community, an additional requisite showing in connection with the "public importance" element. *Id.* at 12. That the Miami Petitioners may consider these aspects to be obvious does not excuse the failure to make a specific showing as required under the rule.

16. In addition, even assuming that Miami Petitioners had demonstrated that the broad, generalized issue of "Cuban-American relations" was a controversial issue of public importance, there was no showing that the alleged personal attacks actually took place during discussion of or in connection with this issue. In this respect, we note that what Miami Petitioners claim is extensive evidence of personal attacks consists largely of broad allegations that such personal attacks "regularly" take place, rather than detailed descriptions of specific attacks. For example, Exhibit 7 to the WQBA Petition to Deny consisted of a statement by Eloy Gutierrez Menoyo, the President of Cambio Cubano.

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[8] The Commission subsequently determined not to continue enforcement of the Fairness Doctrine. *Syracuse Peace Council v. WTVH*, 2 FCC Rcd 5043 (1987), *aff'd, Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). The Commission has continued to consider personal attack rule violations subsequent to the repeal of the Fairness Doctrine. *See* Letter from Dennis Patrick, FCC Chairman, to John Dingell, Chairman, House Comm. on Energy and Commerce, September 22, 1987, at p. 3.

This statement asserts generally that since January 1993, "radio stations WQBA and WAQI have permitted their principal spokesmen or other radio commentators . . . to defame us personally, distort our points of view, and incite terrorism and violence in our community, in fact classifying us as traitors." This statement also refers to a "recent radio program" in which threats were allegedly made against Mr. Menoyo and against certain "members and sympathizers of Cambio Cubano . . . ." Such a broad, non-specific allegation cannot support a personal attack claim; a personal attack complaint must be supported, *inter alia*, by evidence of the specific date and time of the attack, as well as evidence of the specific language used in the attack and of the controversial issue of public importance being discussed at the time the attack took place. *See Pacifica Foundation*, 95 FCC 2d 750, 757 (1983); *Broadcast Procedure Manual, supra*, 49 FCC 2d at 6; *Dontron, Inc., supra*, 6 FCC Rcd 2560, 2562. Mr. Menoyo's statement lacks these necessary specifics, and indeed does not even set forth which station carried this alleged attack.

17. Similarly, Exhibit 8 to the WQBA Petition to Deny, the statement of Francisco G. Aruca, contains the allegation that an announcer on WAQI (known as "Radio Mambi") said that Mr. Aruca was a "motherless person," during a broadcast on September 4, 1993. However, even if this appellation were to be considered an attack, there is lacking any description of the discussion surrounding this "attack" to establish that it took place during a discussion of a controversial issue of public importance. The other material quoted by Mr. Aruca from a WAQI broadcast on March 17, 1993, consisted of a denunciation of opponents of WAQI/Radio Mambi as "work[ing] for the Castro regime" and "represent[ing] the worst in our society . . . ." However, there is nothing in the quoted material that names any specific persons or any identifiable group to which this denunciation was directed. The Commission has long held that the personal attack rule is only applicable where the attack is directed to an identifiable person or group. *See Fairness in Media*, 58 R.R.2d 1633, 1635 (MMB 1985); *Horace Rowley III*, 69 FCC 2d 1047, 1048 (Broadcast Bur. 1978); *Diocese of Rockville Centre*, 50 FCC 2d 330, 331-332 (Broadcast Bur. 1974). Thus Mr. Aruca's statement, even if it had been filed as a formal complaint against Station WAQI, would not describe a personal attack actionable under the rule.

18. The third exhibit submitted by Miami Petitioners purporting to show a personal attack (Exhibit 9) consisted of a statement by Andres Gomez, identified as the national coordinator of the Antonio Maceo Brigade. The statement alleges attacks by announcers on WAQI against Mr. Gomez and the Antonio Maceo Brigade, but the bulk of Mr. Gomez's statement consists of historical perspective on the political rivalry between different Cuban-American political organizations, with some discussion of the more conservative viewpoints generally espoused by WAQI and WQBA announcers on various issues of interest to the Cuban-American community. The only specific material in Mr. Gomez's statement that can be described as some sort of attack appears at page 3, wherein Mr. Gomez describes broadcasts on WAQI related to a demonstration against WAQI itself on March 17, 1993. Mr. Gomez claims that an announcer on WAQI stated that the Antonio Maceo Brigade was "a group of individuals paid by the Castro regime to come before our station and offices with signs dictated from Havana." However, there was no evidence presented here that demonstrates that this statement was made in the course of a discussion of a controversial issue of public importance.[9] As noted above, it is the burden of the complainant to demonstrate that the alleged attack took place during such a discussion, and for this reason, there does not appear to have been a violation of the personal attack rule.

19. Additionally, we affirm the *Honig Letter's* holding that Miami Petitioners' claim is undermined insofar as it does not appear that any of the persons identified as targets of personal attacks contacted the station to invoke their rights under the personal attack rule. Generally, the Commission will not entertain a personal attack complaint where the alleged target has not first contacted the station and afforded it the opportunity to respond. *See Broadcast Procedure Manual, supra*, 49 FCC 2d at 6. The station involved is in the best position to be aware of its broadcast contents and may be able to demonstrate that the broadcasts in question did not contain personal attacks as defined by the rule or that the attack occurred during a kind of programming exempted from the rule. Alternatively, the station may decide that the complaint is valid and offer the entity attacked reasonable opportunity to respond. The Commission's role upon receipt of a complaint is then to judge the reasonableness of the station's determination that a personal attack did not occur. *See Avery D. Post v. CBS, Inc, supra*, 55 R.R.2d 1357, 1360; *Lynne Gordon*, 67 FCC 2d 27, 28 (Broadcast Bur. 1977).

20. We also note that two of the three individuals who claimed to be targets are not among the petitioners to deny the application.[10] The Commission has consistently held that a third party does not have standing to raise a personal attack complaint against a station rather than the target of the attack himself. *See American Legal Foundation*, 58 R.R.2d 1287, 1289 (1985) ("|O|nly the person purportedly attacked has standing to file a personal attack complaint."); *Dontron, Inc., supra*, 6 FCC Rcd at 2562 (The personal attack rule was envisioned as a remedy for those attacked, not for use by unaffected third parties."). That these

[9] It is not readily apparent, for example, whether the comments regarding the Antonio Maceo Brigade were made in a discussion of "Cuban-American relations," the broad issue suggested in the Application for Review, or on the more limited issue of the March 17, 1993, demonstration at the WAQI studios. With respect to the latter issue, it is certainly not self-evident that this specific demonstration at WAQI's studios on March 17, 1993, was itself a controversial issue of public importance, and Miami Petitioners in their Petition to Deny have not identified it as one. The D.C. Circuit Court of Appeals has noted that, "[a] relevant consideration in some cases may be whether the component issues are controversial issues of public importance. If they are not, no obligation to provide contrasting views will arise." *American Security Council Education Foundation v. FCC, supra*, 607 F. 2d 438, 450. The Court also observed that "|a|n issue is not a 'particular, well-defined' issue for fairness doctrine purposes if the separate issues comprising it are so indirectly related that a view on one does not, in a way that would be apparent to an average viewer or listener, support or contradict a view on any other." *Id.* at 450 n.38.

[10] Of the three individuals, Mr. Menoyo (Exhibit 7) is identified as President of petitioner Cambio Cubano. However, as noted above at paragraph 16, his statement alleging a personal attack is the least specific of the three, failing to identify any particular broadcast on a specific station or any specific language of such an alleged attack.

individuals supplied Miami Petitioners with statements regarding these alleged attacks does not transfer standing to Miami Petitioners. *See Fairness in Media, supra,* 58 R.R.2d at 1636 ("Although you state that FIM is 'working with Senator Jesse Helms,' Senator Helms, himself, has not filed a personal attack complaint.").

21. With respect to the claim that announcers on WAQI incited its listeners to riot on March 17, 1993, we affirm the conclusions in both the *Honig Letter* and in the *Montero Letter* that no violation of our rules has been demonstrated. Section 326 of the Communications Act of 1934, as amended, prohibits the Commission from censoring broadcast material and from acts which interfere with free speech by broadcasters, a freedom also guaranteed by the First Amendment to the Constitution. Although infringements may be justified in exceptional situations under the public interest standard of the Communications Act, *i.e.*, broadcasts which are found to create a "clear and present danger of serious substantive evil that rises above public inconvenience, annoyance or unrest," *Anti-Defamation League of B'nai B'rith,* 4 FCC 2d 190, 191 (1966), *aff'd sub nom. Anti-Defamation League of B'nai B'rith v. FCC,* 403 F.2d 169 (D.C. Cir. 1968), *cert. denied,* 394 U.S. 930 (1969), *quoting Terminiello v. Chicago,* 337 U.S. 1, 4 (1949), the Miami Petitioners' case is lacking in this regard. Commission action in response to an allegation that a broadcast should be characterized as an "incitement" to violence or illegal action meeting the "clear and present danger" test is limited to situations where a local court of competent jurisdiction has made such a determination. *See Cattle Country Broadcasting,* 58 R.R.2d 1109, 1113 (1985); *see also Brandenburg v. Ohio* (*"Brandenburg"*), 395 U.S. 444, 447 (1969) (speech becomes illegal advocacy when "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."). This aspect of the test requires a court to "make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 843 (1975).

22. Under *Brandenburg,* any determination that particular speech poses a "clear and present danger of serious substantive evil" presupposes a familiarity with the circumstances, issues, and concerns of the community where such speech was heard, a familiarity which the Commission, in most cases, does not have and cannot practically obtain. Local authorities responsible for keeping the peace and enforcing the law are better positioned to know and assess the specific and unique circumstances in the Miami community and, thus, to determine whether the *Brandenburg* test has been met.

23. Miami Petitioners' reliance on *Columbus Broadcasting Co.,* 40 FCC 631 (1965), and *Cattle Country Broadcasting, supra,* 58 R.R.2d 1109, to dispute the holding that the Commission must rely on adverse findings by local authorities as to the existence of a "clear and present danger" is misplaced. In *Cattle Country,* the Commission *specifically refused* to designate an issue as to whether the licensee had engaged in an incitement to riot, unless a finding had first been made in state court that the licensee had been so convicted:

> We do not have the necessary information and expertise to determine whether there has been a violation of Kansas state law [regarding allegations of incitement to riot through station broadcasts]. If there has been a violation of state law, we would expect it to be litigated before state authorities, not the FCC. Of course, we would take into account any final judgments of state law violations in our proceedings. . . . .
>
> This Commission's regulatory power with respect to analysis of "*clear and present danger*" allegations is also circumscribed. As a national, administrative body, our review is removed both in time and proximity from the events precipitating these complaints. As noted below, the Supreme Court case law on this issue is specific in that it requires judgment on not only the *content* of the speech, but also the *context* in which it is heard. We believe that separate and searching study of these two crucial matters is most appropriately performed by the local authorities under the auspices of applicable state and federal law. We are, therefore, disposed to give significant note and deference to the factual judgments made by them in these cases.

58 FCC 2d at 1113 (emphasis in original). While the Kansas Attorney General was made a party to the renewal hearing that was designated *on other grounds,* that participation was specifically for the purpose of reporting if a conviction of the station owners on incitement to riot charges later resulted from the ongoing criminal prosecution.[11] *Id.*

24. Miami Petitioners' reliance on *Columbus Broadcasting Co.,* 40 FCC 641 (1965), is also misplaced. In that case, the Commission, after a preliminary inquiry into whether the station had broadcast a call for listeners to appear at the entrance to the University of Mississippi where James Meredith was to enroll as the first African-American student there, concluded that "we do not believe it appropriate to delve into this sensitive area," citing a then-recent Supreme Court First Amendment decision, and granted the station's renewal without further question. *Id.* at 643.

25. The staff's treatment of the incitement to violence allegations in the present case is completely consistent with the Commission's prior decisions . Insofar as Miami Petitioners have not pointed to a determination by local authorities that the referenced broadcasts did, in fact, pose a "clear and present danger" to those allegedly attacked, in violation of local law, the Commission is not inclined to act. In this regard, we agree with the conclusion set forth in the *Montero Letter* that the "After Action Report" of the Miami Police Department dated March 18, 1993, falls short of a specific official finding that a broadcast by WAQI posed a "clear and present danger." The "After Action Report" is the Police Department's administrative report summarizing expenditures in connection with police re-

[11] It should be noted that *Cattle Country* predated the Commission's decision not to take cognizance of non-FCC related misconduct until there had been a final adjudication of the allegations in an appropriate forum. *Policy Regarding Chartacter Qualifications in Broadcast Licensing,* 102 FCC 2d 1179, *recon. granted in part, denied in part,* 1 FCC Rcd 421 (1986), *modified,* 5 FCC Rcd 3252 (1990).

sponse to the March 17, 1993, demonstration outside WAQI's studio discussed above. That Report, while recommending that the city consider filing an action against WAQI to recover the costs of police deployment, does not include a conclusion or finding that WAQI broadcast inflammatory remarks or otherwise acted in an irresponsible manner.[12] We therefore affirm the Bureau's rejection of these allegations in the *Honig Letter* and in the *Montero Letter*.

26. Accordingly, IT IS ORDERED that the Application for Review filed September 9, 1994, by Cambio Cubano, Professionales y Empressarios Cubano Americanos (Peca/Cape), and Sepia Fine Graphic Arts, Inc. d/b/a/ *Contrapunto* Magazine IS DENIED; that the Application for Review filed June 5, 1995, by Cambio Cubano, Professionales y Empressarios Cubano Americanos (PECA/CAPE), and Sepia Fine Graphic Arts, Inc. d/b/a/ *Contrapunto* Magazine IS DENIED; that the grant of the application for transfer of control of Spanish Radio Network, licensee of Stations WQBA(AM) and WQBA(FM), Miami, Florida, WGLI(AM), Babylon, New York, and WADO(AM), New York, New York, from Mark Blank, Tony Blank, Herbert M. Levin, Robert Frehling, Russell Frehling, Kathy Kramer, and Broadcast Holdings, Inc., to HBC Florida, Inc., IS AFFIRMED; and that the grant of the applications for transfer of control of Licensee Corporation #1, licensee of Station WAQI(AM), Miami, Florida, and of Licensee Corporation #2, licensee of Station WRTO(FM), Goulds, Florida, IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[12] As noted in the *Montero Letter* at page 6, the transcripts of WAQI's broadcasts on March 17, 1993, in connection with the demonstration do not in substance show an incitement to violence, but rather tend to show that WAQI personnel urged calm and restraint among the protesters. *See* Attachment A to Heftel's Motion to Dismiss filed October 12, 1994, in the WAQI/WRTO proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: September 12, 1995

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Stainless Broadcasting Company 1800E
Licensee, WICZ-TV
P.O. Box 1626
Binghamton, NY 13902

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE in the amount of one hundred ten thousand dollars ($110,000) pursuant to § 503(b) of the Communications Act of 1934, as amended, for willful and repeated violation of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming. In addition, WICZ-TV will be subject to reporting conditions during its next license term.

In response to the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, the Commission adopted rules and policies limiting the amount of commercial time which may be aired during children's programming to 10.5 minutes per clock hour on weekends and 12 minutes per clock hour on weekdays. Section 73.670 of the Commission's Rules, 47 C.F.R. § 73.670. The Commission also stated that it would consider in its review of television station license renewals the extent to which the licensee had complied with these commercial limits. *Children's Television Programming*, 6 FCC Rcd 2111, *recon. granted in part*, 6 FCC Rcd 5093 (1991). The commercial limitations became effective on January 1, 1992. *Children's Television Programming*, 6 FCC Rcd 5529 (1991).

On November 18, 1993, you filed a letter in advance of the filing date for the renewal application of Station WICZ-TV, Binghamton, NY, notifying the Commission that WICZ-TV had exceeded the commercial limitations on children's programming specified in Section 73.670 of the Commission's Rules on 368 separate occasions. Of these commercial overages, one was greater than three minutes in length; 52 were two minutes to two minutes and 59 seconds in length; 66 were one minute to one minute and 59 seconds in length; 211 were 30 seconds to 59 seconds in length; and 38 were less than 30 seconds in length. You state that you first became aware that WICZ-TV had exceeded the children's television commercial limits on October 7, 1993, in the course of preparing your quarterly report on children's programming; that in entering into contracts for syndicated children's programs the station's management "had been particularly careful to ensure that the commercial formats they specified were in full compliance with the Commission's rules", but violations occurred because the station's Program Manager "failed to follow explicit instructions to fill the breaks between programs with public service and promotional announcements"; and that, to rectify the problem and insure future compliance with the Commission's children's television rules and policies, you (i) terminated the Program Manager and replaced her with "a more senior employee with greater managerial experience", and (ii) instituted additional children's programming review procedures.

Subsequently, on January 31, 1994, you filed an application for renewal of license for WICZ-TV (BRCT-940131LC), including a supplement to FCC Form 303-S which contains questions to determine whether the licensee has complied with the limits on commercial matter in children's programming, as set forth in 47 C.F.R. § 73.670. In this supplement, you again stated that WICZ-TV had failed to comply with the limitations on commercial matter during children's programming during your last license term. In Exhibit 2 to that renewal application, you referred to your November 18, 1993 letter, and listed eight additional instances of commercial overages during children's programming; one of these additional overages was less than 30 seconds in length, and seven were of unspecified duration.

WICZ-TV's record of exceeding the Commission's limits on commercial matter during children's programming on 376 occasions constitutes a willful and repeated rule violation. Accordingly, pursuant to § 503(b) of the Communications Act, Stainless Broadcasting Company is hereby advised of its apparent liability for a forfeiture in the amount of one hundred ten thousand dollars ($110,000) for its apparent willful and repeated violation of 47 C.F.R. § 73.670. The amount specified was reached after consideration of the factors set forth in §503(b)(2) of the Communications Act, and in particular, the following criteria: (1) the number of instances of commercial overages; (2) the length of each such overage; (3) the period of time over which such overages occurred; (4) whether or not the licensee established an effective program to ensure compliance; and (5) the specific reasons that the licensee gives for the overages. These criteria were considered by the Commission in earlier cases when determining the appropriate forfeiture amounts for violations of the commercial limits during children's programming. *See, e.g., Koplar Communications*, 8 FCC Rcd 7884 (1993); *Independent Communications, Inc.*, 8 FCC Rcd 7886 (1993); and *KXRM Partnership*, 8 FCC Rcd 7890 (1993). A recent court decision set aside a *Policy Statement* that we previously used as a guideline for assessing forfeitures. *Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993). In *United States Telephone Ass'n v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994), the court indicated that the *Policy Statement* must be subject to public comment to comply with the Administrative Procedure Act. The Commission will act on the court's Order in a separate proceeding. While the criteria considered in connection with commercial overages were developed in cases decided under the *Policy Statement*, they were not inherently tied to the *Policy Statement*. Without regard to the *Policy Statement*, we continue to believe that these criteria are appropriate in analyzing violations of the commercial limits during children's programming since they take into account, *inter alia*, "the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability," as required under Section 503(b)(2)(D) of the Communications Act. *See Clear*

Channel Television, Inc. (KTTU(TV)), 10 FCC Rcd 3773 (1995); *Northstar Television of Erie, Inc. (WSEE-TV)*, 10 FCC Rcd 3779 (1995).

The 376 occasions on which WICZ-TV exceeded the hourly limits on commercial matter during children's programming is an extremely high number of violations. Moreover, at least 119, and as many as 126, of the overages were one minute or more in length. Overages of this magnitude and duration mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it adopted the Children's Television Act of 1990. *Children's Television Programming*, 6 FCC Rcd at 2117-18. Further, although the children's television commercial limitations went into effect on January 1, 1992, WICZ-TV did not discover these violations or take effective action to preclude commercial overages in children's programs until October, 1993, 22 months after the commercial limitations went into effect. In a letter filed on July 12, 1994, you state that the additional children's programming review procedures described in your November 18, 1993 letter had been "100% effective" in that there had been no additional violations of the children's television commercial limits. Thus, it appears that WICZ-TV took effective corrective action when it first discovered that it was in violation of the children's television commercial limitations. However, the fact that WICZ-TV may now have implemented a plan to prevent future commercial overages does not relieve the station of liability for prior violations. *See International Broadcasting Corp.*, 19 FCC 2d 793, 794 (1969). The length and repeated nature of the overages on WICZ-TV and the period of time during which such overages occurred constitute egregious misconduct warranting a substantial forfeiture amount.

The number and duration of the overages by WICZ-TV are among the most egregious violations the Commission has considered. For instance, in *Paramount Stations of Houston, Inc.*, 9 FCC Rcd 140 (1993), the licensee exceeded the children's television commercial limits on 132 occasions, of which 19 were one minute or more in length and 73 were program-length commercials. The forfeiture assessed in that case was $80,000. Although there are no program-length commercials in the instant case, the total number of commercial overages by WICZ-TV (376) and the number of commercial overages in excess of one minute (at least 119, and as many as 126) are substantially higher than in the *Paramount* case. In *Clear Channel Television, Inc., supra,* the licensee exceeded the commercial limits on 581 occasions over a period of 15 months from January, 1992 to April, 1993. Of those commercial overages, 375 were more than one minute in length. Among other sanctions, a forfeiture of $125,000 was assessed in that case.

Further, there do not appear to be any mitigating factors warranting a reduction in the amount of the forfeiture. When the Commission delayed the effective date of 47 C.F.R. § 73.670 until January 1, 1992, we stated that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance [and], in the context of any enforcement action for violations of the limits, we would be unlikely to be sympathetic to claims of transitional difficulties." *Children's Television Programming*, 6 FCC Rcd at 5530 n.10. WICZ-TV has not proffered any extraordinary transitional or other difficulties that prevented it from complying with the commercial limits during its license period. Instead, the violations appear to result from WICZ-TV's failure to communicate effectively to station staff the need for strict compliance with the commercial limits and its failure to monitor and review adequately the station's performance in this area. Consideration of all of these factors warrants a forfeiture in the above-specified amount of $110,000.

Given the breadth of the violations in this case and the substantial failure of the licensee to establish monitoring and compliance procedures, we believe that an additional remedial measure is warranted in order to ensure that Station WICZ-TV complies with our limitations on commercials during children's programming in the future. Accordingly, we will impose reporting conditions. During its next license term, WICZ-TV will be required to report to the Commission, on a quarterly basis, whether it has complied with our limits on commercial matter during children's programming. Moreover, any noncompliance will have to be described in detail.

Notwithstanding the substantial nature of the violations at issue here and the severity with which we regard them, there is no suggestion that the licensee has acted in bad faith and we do not believe they reflect a deliberate disregard for Commission requirements. Rather, these violations reflect the licensee's failure to institute procedures to ensure compliance with the children's television commercial limitations. Accordingly, we do not believe that these violations constitute an impediment to grant of the application for renewal of license for Station WICZ-TV. Therefore, the license renewal application of Stainless Broadcasting Company, BRCT-940131LC, IS HEREBY GRANTED for a term to end June 1, 1999, subject to the condition that:

> Station WICZ-TV shall submit to the Commission an original and one copy of the following information within thirty (30) days after the end of each calendar quarter during its next license term:
>
> (a) A statement certifying whether the licensee has complied with the limits on commercial matter as set forth in 47 C.F.R. § 73.670.
>
> (b) A list of each segment of programming, 5 minutes or more in duration, designed for children 12 years old and under and broadcast during the license period which contained commercial matter in excess of the limits set forth in 47 C.F.R. § 73.670. For each such programming segment so listed, indicate the length of the segment, the amount of the commercial matter contained therein, and an explanation of why the limits were exceeded.

With respect to this forfeiture proceeding, you are afforded a period of thirty (30) days from the release date of this document "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of § 1.80 of the Commission's Rules are summarized in the attachment to this letter.

This letter was adopted by the Commission with Commissioner Quello concurring in the result, on August 28, 1995.

BY DIRECTION OF THE COMMISSION

William F. Caton
Acting Secretary

Attachments
cc: Suzanne M. Perry, Esq.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-135

In re Applications of

THE PETROLEUM V. NASBY CORPORATION — File No. BRH-890601VB

For Renewal of License
of Station WSWR(FM)
Shelby, Ohio

THE PETROLEUM V. NASBY CORPORATION — File Nos. BTCH-921019HX and BTCH-921019HY

For Transfer of Control of
Station WSWR(FM)
Shelby, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: September 1, 1995; Released: September 13, 1995

By the Review Board: MARINO (Chairman) and GREENE.

Board Member GREENE:

1. In a *Decision* in this proceeding, FCC 95R-11, released June 5, 1995, the Review Board granted the license renewal application of The Petroleum V. Nasby Corporation for Station WSWR(FM) and granted the licensee's application for *nunc pro tunc* approval of transfer of control of the station. These actions were conditioned upon specific divestiture provisions relating to present and future stock ownership and corporate management of the licensee. We now have before us a petition for reconsideration and/or clarification filed July 5, 1995 by Nasby, as well as an opposition filed July 19 by the Mass Media Bureau,[1] and a reply filed July 31 by Nasby. Nasby's petition relates solely to the aforenoted divestiture provisions.

2. In its *Decision* the Board held that the criminal convictions of Thomas L. Root, Nasby's former corporate secretary, director, major stockholder, and legal counsel, did not require denial of its license renewal application because Mr. Root's illegal activities were apparently unknown to the other Nasby principals who were uninvolved in any of the incidents of Mr. Root's adjudicated misconduct, and Mr. Root was not in charge of the day to day operation and management of the station. We also affirmed the ALJ's holding that although Mr. Root and his wife, Kathy G. Root, had engaged in an unauthorized transfer of control of the station, in the absence of a record of accompanying concealment, renewal of license would not be denied on this basis either. Nevertheless, in view of the unsettling if not unprecedented circumstances presented, namely, that the wrongdoer, Mr. Root, had terminated his controlling interest in the licensee by transferring his ownership to the members of his immediate family, including his wife, his children, and his parents, we directed that these interests be divested to unrelated parties within sixty days. We applied the same condition to the corporate positions of secretary and director assumed by Mr. Root's mother subsequent to her son's resignation from the station. In ordering these divestitures, we were specifically concerned that the station not be subject in the future to the taint of Mr. Root's influence.

3. In its petition, Nasby first seeks clarification of that aspect of our divestiture directive that requires Nasby to carry out the proposed transfer of 70.25 shares owned by Mr. Root's parents to the law firm of Ginsburg, Feldman & Bress in payment of legal fees incurred in representing Root. Nasby seeks assurance that the proposed transfer satisfies our condition that the stock be divested to "unrelated buyers." In the body of our *Decision*, at para. 24, the Board included these shares as part of the "Root family holdings involved in the unauthorized transfers of control" that were to be divested to unrelated third parties, and the ordering clause, para. 25, granted the transfer of control application specifically covering these shares. Thus, the proposed stock transfer to Ginsburg, Feldman & Bress would satisfy the Board's requirement contained in the ultimate ordering clause, para. 26, that the stock be divested to unrelated parties.

4. Next, Nasby seeks reconsideration of the condition requiring divestiture of the 33 shares Kathy G. Root owns individually, the 50 shares she holds as custodian for her children, and the 100 shares owned by the Root children through a trustee. Nasby contends that the divestiture imposes an undue hardship on it because WSWR(FM) is a 3 kw station whose operation is marginal, the station is not in a financial position to purchase the stock, there is no secondary market to sell less than a controlling interest in a station of its size, and 60 days is not sufficient time within which to find a purchaser. As an alternative to divestiture, Nasby proposes that the Board permit it to establish a new trust to hold title to the shares now owned by Kathy G. Root and her children. As contemplated by Nasby, such a trust would be administered by an independent trustee unrelated to members of the Root family and would be irrevocable. The principal features of the proposed trust arrangement would include the following: (a) the trustee would have sole voting control over the shares held for the benefit of Kathy G. Root and her children; (b) no beneficiary or other person would be empowered to replace the trustee or direct him in the discharge of his duties; (c) the trustee would be prohibited from selling the stock to any beneficiary or other member of the Root

[1] Other than arguing that Nasby's petition does not satisfy the criteria required for reconsideration in that it does not point out any material errors or omissions in the Board's *Decision*, the Bureau offers no substantive response to Nasby's pleading. It does contend, however, that Nasby's renewal application should be denied for the reasons stated in its Application for Review filed with the Commission on July 5, 1995, a copy of which is attached to its opposition. We will not address again the Bureau's position, which was considered fully in our *Decision*. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

family; (d) the trustee would be prohibited from providing any beneficiary with any information relating to the operation, management, or financial condition of Nasby; and (e) the trustee could select a replacement trustee without participation or consultation with any member of the immediate Root family. Moreover, Nasby asserts, the trust arrangement would otherwise comply with the Commission's attribution policies regarding voting trusts, citing *Corporate Ownership Reporting and Disclosure by Broadcast Licensee,,* 97 FCC 2d 997, 1023-24 (1984), *recon. granted in part,* 58 R.R. 2d 604 (1985). This arrangement, Nasby submits, would address the Board's concern that any potential presence of Thomas L. Root be removed and would allow for a transfer of the stock at a later date in an orderly fashion.

5. The Board will decline Nasby's invitation to accept its proposed trust arrangement in lieu of the stock divestitures ordered herein. In our *Decision*, we recited the unusual circumstances of Mr. Root's departure from Nasby which at bottom did not amount to a clean break from the station but involved a series of stock transfers of his considerable ownership interest to the members of his immediate family. These transactions, cumulatively, amounted to an unauthorized transfer of station control, and Mr. Root's wife, Kathy G. Root, who would be a beneficiary of the proposed trust arrangement, participated in the transfer. In addition, Mr. Root's mother, Joanne Root, who, together with her husband, received 70.25 of the subject shares of stock, also succeeded her son to membership on Nasby's three member board of directors and as corporate secretary. While we affirmed the ALJ's holding that, in the absence of accompanying misrepresentation, the unauthorized transfer of control in this case does not require denial of renewal, this did not mean that the Commission is powerless to fashion an appropriate sanction in accordance with the facts of record. *See Deer Lodge Broadcasting, Inc.*, 86 FCC 2d 1066 (1981) (illegal transfer of control unaccompanied by concealment results in short-term renewal). In our view, divestiture of those interests involved in the unauthorized transfer to unrelated third parties is the most suitable means of providing WSWR(FM) with an independent future untainted by its unfortunate association with Mr. Root.

6. While we will not accept Nasby's proposal as an alternative to divestiture, nevertheless, we will allow its trust arrangement for an interim period of six months in lieu of ordering divestiture within sixty days of the stock owned by Mrs. Root and her children. We do so, notwithstanding Nasby's failure to provide specific support for its bare assertions, because we take Nasby's point that the sale of these shares in a small market station would be very difficult to achieve in the near term. We believe a six month period should be adequate time to locate unrelated buyers for the stock. If it is not, and if need be, the shares can be transferred at the end of six months to the corporate treasury and held there until buyers can be found. In the interim, we are satisfied that the contemplated trust arrangement, as described by Nasby, comports with the Commission's attribution standards for voting trusts and contains adequate safeguards for the independent control and voting of these shares so that they will not be subject to the prospective presence of Mr. Root. As suggested by Nasby, and pursuant to our *Decision*, at note 12, the specific trust terms should be submitted as an addendum to the transfer of control application governing the subject shares, and the amendment as well as all processing questions and other inquiries regarding implementation of the arrangement should be directed to the appropriate officials of the Mass Media Bureau.

7. Finally, Nasby requests that the Board reconsider its directive ordering Mr. Root's mother, Joanne Root, to relinquish her corporate positions as officer and director. Nasby argues that this condition is overly harsh in that Joanne Root has been a Nasby stockholder for twelve years and was duly elected to her corporate roles. We will not reconsider this aspect of the divestiture order. While it may be true that Joanne Root has been associated with the licensee for some time, it is equally true that she became Nasby's corporate secretary and one of its three corporate directors only following her son's resignation from these positions. Moreover, unlike the proposed trust arrangement discussed earlier, which is designed to remove the possibility that Mr. Root could influence the voting of the shares in question, Joanne Root has active and significant corporate leadership roles which cannot be insulated in the same way.

8. ACCORDINGLY, IT IS ORDERED That the petition for reconsideration and/or clarification, filed July 6, 1995, by The Petroleum V. Nasby Corporation, IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WARNER CABLE
COMMUNICATIONS, INC.,
Petitioner,

v.

CITY OF WADSWORTH, OHIO,
Respondent.

Appeal of Local Rate Order

MEMORANDUM OPINION AND ORDER

Adopted: September 6, 1995; Released: September 13, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On April 20, 1994, Warner Cable Communications, Inc. (("Warner") filed an appeal of the local rate order, adopted on March 25, 1994, by its franchising authority, the City of Wadsworth, Ohio ("City"). In the local rate order, the City established regulated rates for basic cable service and associated equipment, provided by Warner, as allowed by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 "Cable Act").[1] The local rate order establishes a new schedule of basic service and equipment rates and directs Warner to issue refunds to subscribers for all payments made in excess of the rates set forth in the local order for the period September 1, 1993 through May 14, 1994. The City opposes Warner appeal.[2]

2. Warner raises a number of issues on appeal. Specifically, Warner alleges that, in the local rate order, the City improperly: (1) regulated three channels offered as a tier or individually (a la carte); (2) excluded a home shopping network (QVC) from the basic service tier; (3) required the lowest bulk rate in the franchise area to be the bulk rate charged to all bulk subscribers in the franchise area; (4) found that Warner may have violated the Commission's rate freeze; (5) prevented Warner from selling in-house amplifiers to subscribers; (6) prevented Warner from charging cable programming service tier subscribers a monthly additional outlet fee; (7) prevented Warner from charging subscribers for service calls; (8) disallowed Warner treatment of its monthly "community service fee" as a franchise fee. Warner further claims that the procedures used by the City in adopting its local rate order violated the Commission's due process rules. Warner contends that those City actions were improper and in violation of our rules.[3] We consider each of these issues in turn. Warner also questions the authority of local franchising authorities to require refunds. We have responded to that argument previously and have established rules which authorize the local franchising authority to order refunds for unreasonable basic service tier rates.[4] We will not revisit that issue here.

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[1] Under the 1992 Cable Act and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 1002-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), *as amended*, 47 U.S.C. § 543(b) (1992).

[2] The City filed a response to Warner appeal on May 5, 1994, to which Warner filed a reply on May 17, 1994. Warner also filed a petition requesting a stay pending Commission review of the local rate order on April 20, 1994, to which the City filed an opposition on April 28, 1994. On May 13, 1994, Warner filed an emergency petition for writ of mandamus with the United States Court of Appeals for the District of Columbia. On May 17, 1994, we stayed the local rate order for 45 days and Warner filed a motion to dismiss its mandamus petition. Warner motion was granted by the Court of Appeals on May 30, 1994. On June 29, 1994, we extended the stay granted in the case for another 45 day period beginning July 1, 1994. On August 8, 1994, we extended the stay granted in the case to either 10 days after the release of an order or orders by the Commission resolving the issue raised in the a la carte Letters of Inquiry or resolution of the instant appeal, whichever happened first. Finally, on November 18, 1994, we amended the stay granted in the case, so that it would remain in effect until resolution of the underlying appeal. Since we reach the merits of Warner appeal in this order, the stay is vacated. We also note that the City's Application for Review of Stay Order, filed on June 16, 1994, and Warner opposition to the City's application, filed on July 1, 1994, are mooted by our decision here.

[3] Warner raised two additional issues. First, Warner contends that the City had originally questioned Warner satellite channel count on its Form 393. The parties now agree, though they apparently reached the same result by using different methods, that the proper number is 15 and this issue is therefore dismissed as moot. We note, however, that Warner used the correct method to count its satellite channels, namely that a channel carrying satellite delivered programming more than 50% of the time the channel is on the air is a satellite channel for purposes of Form 393. *See, for example,* Viacom Cable (Nashville, Tennessee, DA 94-1151, ¶ ¶ 61-c (Cab. Serv. Bur., released November 9,1994). Second, Warner further contends that the City erred by finding that Warner is prohibited from charging for service calls. Furthermore, Warner continues, such a finding was unnecessary since Warner admits that, at present, it does not charge for service calls. The City counters that it simply stated that Warner had not justified service call charges for purposes of Form 393 and that if Warner began charging for service calls in the future, it would have to first justify such charges with the City. Both parties agree that for the time period covered by Form 393, no charges for service calls were imposed. For purposes of this appeal then, there is no controversy to resolve and this issue is therefore dismissed. Future service call charges for equipment maintenance/repair contracts should be based on Warner's then current Hourly Service Charge times the estimated average number of hours for maintenance/repair over the life of the equipment. 47 C.F.R. § 76.923(j).

[4] 47 C.F.R. § 76.942(a) ("a franchising authority may order a cable operator to refund to subscribers that portion of previously paid rates determined to be in excess of the permitted tier charge or above the actual cost of equipment"). Our rules on this issue were recently upheld by the United States Court of Appeals for the District of Columbia. Time Warner Entertainment Co. v. FCC, No. 93-1723, ___ F.3d ___ (D.C. Cir., June 6, 1995).

II. DISCUSSION

3. Under our rules, rate orders issued by local franchising authorities may be appealed to the Commission.[5] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[6] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[7] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[8]

A. A La Carte Channels

4. Warner objects to the City's decision to calculate maximum initial permitted rates for basic services by treating Warner's a la carte package, consisting of American Movie Classics (AMC), The Discovery Channel (Discovery) and WTBS, as a rate regulated offering.[9] Warner argues that its a la carte package complies with the provisions of the 1992 Cable Act, which it contends encourage cable operators to unbundle programming services from regulated tiers and offer them on a per-channel basis, and that the package complies with the Commission's a la carte rules in effect at the time the package was created.[10] Warner further argues that the City's reliance upon the 15 interpretive guidelines announced by the Commission in March, 1994 to determine the regulatory status of Warner's a la carte channels constituted "retroactive rulemaking."[11] The City responds that it properly applied the Commission's guidelines on a la carte packages and concluded that the channels in the Warner package should be treated as regulated channels.

5. The Warner a la carte package at issue resulted when Warner restructured the service offerings on its Wadsworth system. Warner's restructuring involved offering two channels, AMC and Discovery, that previously had been offered on its former cable programming service tier (Warner "standard" tier) and one, WTBS, previously offered on its former basic cable programming service tier, on an individual basis and also as a package that Warner alleges is not subject to rate regulation.

6. The facts presented in this appeal closely resemble the facts presented in one of our letter of inquiry orders on a la carte packages, *Time Warner Cable* (Everett, Winthrop and Somerville, Massachusetts), DA 94-1353 (Cab. Serv. Bur., released December 2, (1994). In *Time Warner Cable*, we found we could not say that it was clear that the a la carte package, identical to the one at issue here, offered by Warner on its Everett, Winthrop and Somerville, Massachusetts system was not a permissible non-rate regulated offering under our rules. We further concluded that in light of the prior confusion over what constituted a permissible non-rate regulated a la carte offering, it would be inequitable to subject Warner to refund liability or to require Warner to restructure its tiers so as to return the channels offered in the a la carte package to regulated tiers. Instead, we found that, on a prospective basis, Warner's a la carte package may be treated as a new product tier under the Commission's *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Sixth Order on Reconsideration, MM Docket No. 92-215, Fifth Report and Order*, 10 FCC Rcd 1226 (1995) (*"Going Forward Order"*).[12]

7. We find that the City's determination in its local rate order that the channels comprising Warner's a la carte package must be included as regulated channels is inconsistent with the action taken in *Time Warner Cable*. We further find that, in accordance with *Time Warner Cable*, Warner's a la carte package should not be treated as a rate-regulated tier of service. Accordingly, Warner's appeal on this issue is granted and we remand the local rate order to the City for further proceedings consistent with this ruling.[13]

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[5] *See* 47 C.F.R. § 76.944.

[6] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5731(1993) (*"Rate Order"*); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, and Buy-Through Prohibition, MM Docket No. 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316, 4346 (1994) (*"Third Recon. Order"*).

[7] *Id.*

[8] *Id.*

[9] Warner also contends that the City lacked the authority to determine the regulatory status of its a la carte service offerings. We disagree. Local franchising authorities have several ways to address operators' a la carte offerings, *see* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, 9 FCC Rcd 4119, 4215 n.262 (1993) (*"Second Recon. Order"*); Public Notice, Question and Answers on Cable Television Rate Regulation, Q\A 17 (released April 26, 1994), including the one used by the City here, reaching an a la carte determination as part of its final order setting basic service tier rates, which is then appealable to the Commission pursuant to 47 C.F.R. § 76.945. Warner's contention is therefore without merit.

[10] *See Rate Order*, 8 FCC Rcd at 5836-5838.

[11] In the *Second Recon. Order*, the Commission set out 15 guidelines "that local authorities and the Commission should consider in assessing in an individual case whether an 'a la carte' package enhances consumer choice and does not constitute an evasion of rate regulation." *Second Recon. Order*, 9 FCC Rcd at 4214.

[12] New product tiers are cable programming services that, subject to certain conditions, are not rate regulated. *Going Forward Order*, 10 FCC Rcd at 1233-38. In the *Going Forward Order*, the Commission reconsidered its regulatory treatment of collective offerings of a la carte channels. Specifically, the Commission determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at 1243. However, the Commission also stated that with respect to packages created between April 1, 1993 and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

[13] We need not address Warner's argument with respect to the "retroactive" application by the City of the 15 guidelines set forth in the *Second Recon. Order*, in light of the fact that we grant Warner's appeal on this issue.

B. Basic Service Tier Channel Addition

8. Warner next contends that the City erred in not recalculating its FCC Form 393 maximum permitted per-channel rate to account for the fact that a regulated channel (QVC) was added to Warner's lineup on November 22, 1993, increasing the number of regulated channels from 15 to 16, after the initial date of regulation. The City counters that on the initial date of regulation, Warner had 15 regulated basic channels and it was therefore proper to base its rate order on that fact. The City also contends that it wasn't notified of the channel addition until December 17, 1993 and that in the materials received ,on that date, Warner stated that the new channel lineup would not become effective until January 24, 1994.

9. Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[14] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its equipment and installation costs and maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

10. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[15] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate level is below the applicable benchmark rate, then the operator's rate level is deemed reasonable, but it must remain at its current level. If its current per-channel rate level exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate level to the applicable benchmark rate. If its September 30, 1992 per-channel rate level is above the benchmark rate, it must reduce this rate level to the benchmark rate or by 10%, whichever reduction is less. After computing the permitted rate level in this manner (whether based on current rates or September, 1992 rates), monthly equipment and installation costs are removed to derive the maximum permitted programming rates. Maximum permitted rates for equipment and installation are based on actual cost and are separately calculated in Part III of the Form 393.

11. An important variable in calculating an operator's benchmark rate is the number of regulated channels which it offers. In a situation similar to the present one, we concluded that an operator that changed its channel line-up after the initial date of regulation should have two different maximum permitted rates, one rate for the period prior to the channel line-up change, and another rate for the period after the change.[16] We agree with Warner that its channel line-up change should be taken into ccount in the determination of its maximum permitted basic tier rates. Contrary to the City's assertion, the fact that Warner may have added the channel to the basic tier before it gave proper notice to its subscribers does not preclude recalculation of its per-channel rate. Instead, the timing of Warner's notice determines the period over which the two rates, one prior and one subsequent to Warner's channel line-up change, are calculated and applied in determining refund liability. On remand, the City should determine the date both subscribers and franchising authorities had thirty days notice of the channel line-up change, as required by our rules.[17] That date will then serve as the date Warner channel line-up change became effective for purposes of recalculating its per-channel rate. The rate for the period from September 1, 1993 until the channel line-up change date, will remain the same. The rate for the second period, from the channel line-up change date until May 14, 1994, should be determined by multiplying the increased number of channels on Warner's basic service tier (16) by Warner's maximum permitted per-channel charge, as set forth on Line 600 of Part II of its FCC Form 393.[18] This issue is remanded to the City for further proceedings consistent with this opinion.

C. Bulk Rates

12. Warner next contends that the City erred in ordering it to provide the "highest discount" (i.e., the lowest bulk rate) to all Multiple Dwelling Unit ("MDU") bulk customers. The City counters that it took this action only because Warner failed to justify distinctions among its bulk rates charged to MDU customers. While the City may order the rates of MDUs reduced to a lower rate established by Warner for MDUs of the same size and under similar conditions, the City may not simply reduce all bulk rates offered by Warner to the lowest bulk rate.[19]

13. Franchising authorities have the authority to regulate bulk basic rates to ensure compliance with the uniform

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[14] To the extent that an operator has sought to take advantage of the refund deferral period available under our rules in Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119, 4183-4185 (1994) (*"Benchmark Order"*), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

[15] An operator must calculate its rate in effect on September 30, 1992, only if its current rate level is above the benchmark rate. If an operator's current rate level is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

[16] *See* Warner Cable Communications (Milwaukee, Wisconsin), 10 FCC Rcd 772 (1994) (*"Warner of Milwaukee"*). Although *Warner of Milwaukee* involved channel line-up changes to the cable programming service ("CPS") tier, our holding there equally applies to the situation here.

[17] 47 C.F.R. §§ 76.309(c)(3) and 76.964.

[18] *See Warner of Milwaukee*, 10 FCC Rcd at 776, n.18.

[19] SBC Media Ventures, Inc. (Montgomery County, Maryland), 9 FCC Rcd 7175, 7181 (1994).

rate provisions of the 1992 Cable Act.[20] Under our rules,[21] cable operators may offer different bulk rates to MDUs of different sizes and may vary bulk rates based on the duration of the contracts, provided the operator can justify the rate differences based on relative cost savings.[22] Operators must, however, offer the same rates to MDUs of the same size with contracts of similar duration.[23] Accordingly, on remand, the City may order Warner to charge identical rates to all MDUs of the same size with contracts of similar duration. The City may not, however, simply reduce all bulk rates offered by Warner to the lowest bulk rate. This issue is therefore remanded to the City for further proceedings consistent with this order.

D. Rate Freeze

14. Warner next contends that the City erred by finding in the local rate order that Warner may have violated the Commission's rate freeze.[24] Warner claims it did not violate the rate freeze and that in any event, the Commission, not the City, has exclusive jurisdiction to enforce the rate freeze. The City counters that it simply found that a freeze violation may have occurred and would consider taking further action in an appropriate forum. Since the City has not attempted to enforce the rate freeze, we have no controversy to resolve and this issue is therefore dismissed.[25]

E. In-house Amplifiers

15. Warner next contends that the City erred by prohibiting Warner from imposing charges for in-house amplifiers sold to subscribers. The City counters that it disallowed the charge because Warner failed to sufficiently justify the charge. Warner replies that this equipment is not properly subject to regulation by the City because it is sold to customers, not leased.

16. Under the Commission's rules, rates for equipment, whether leased or sold to subscribers, used to receive basic service are regulated.[26] Our rules provide that regulated equipment consists of all equipment in a subscriber's home used to receive basic service.[27] Regulated equipment ". . . consists of all the equipment in a subscriber's home that is used to receive the basic tier. . . . Such equipment shall include, but is not limited to: (1) converter boxes; (2) remote control units; (3) connections for additional television receivers; and (4) other cable home wiring."[28] This list of equipment is not intended to be an exhaustive list of all possible types of regulated equipment, but all such equipment, at a minimum, "must be used to receive the basic service tier." The Commission has interpreted the phrase "equipment used to receive the basic service tier" so as to comport with Congressional intent.[29] Rates for the sale of regulated equipment must be based on actual costs[30] and must be "unbundled" or priced separately.[31]

17. Amplifiers are devices used to strengthen a cable signal which might otherwise be too weak for a television to process properly. Households with additional outlets "split" the cable signal, thus reducing its strength and its ability to reach a television receiver. Without an amplifier, televisions attached to additional outlets may receive a weakened signal and project a poor quality television picture. Amplifiers may therefore be necessary for some subscribers to receive basic service through their additional outlets and are subject to our rate regulations. The price subscribers are charged for amplifiers must comport with the actual cost standard of our rules. Under this standard, an operator must be permitted to recover the cost of the equipment, including the costs to store and prepare it, plus a reasonable profit.[32] A franchising authority may not arbitrarily set prices for such equipment at zero. Warner's appeal on this issue is therefore remanded to the City for further proceedings consistent with this order.

F. Additional Outlet Charges

18. Warner next contends that the City improperly disallowed its additional outlet charge. Warner claims that the charge is assessed to recover additional program supplier costs for the cable programming service (CPS) tier and therefore only subscribers receiving the CPS tier are assessed the additional charge. The City does not dispute Warner's assertion that only CPS subscribers are assessed the charge. Characterizing the charge as related exclusively to programming costs for its CPS tier, Warner further contends that the City lacked jurisdiction to rule on the matter. The City counters that Warner did not adequately justify its claim that the charge was due to additional programming costs for CPS tier subscribers.

19. The jurisdiction of local franchising authorities to regulate cable television rates is limited to those charges and services associated with the basic service tier.[33] Charges associated solely with the CPS tier are under the Commission's jurisdiction.[34] Because most equipment-related charges imposed on the CPS tier are also imposed on the basic tier, local franchising authorities almost always regu-

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[20] *Rate Order*, 8 FCC Rcd at 5899.

[21] 47 C.F.R. § 76.984. *See Rate Order*, 8 FCC Rcd 5896-99; *Third Recon. Order*, 9 FCC Rcd at 4355-58.

[22] *Id.*

[23] *Id.*

[24] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"*), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993) (*"Deferral Order"*), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993) (*"November 10 Extension Order"*); *extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994) (*"February 8 Extension Order"*). Generally, these orders required operators to freeze the average amount of revenues received per subscriber for regulated cable services at the level in effect on April 5, 1993. The freeze was effectuated by requiring that the average monthly subscriber bill for services subject to rate regulation may not increase above the average monthly subscriber bill in effect on April 5, 1993. 8 FCC Rcd at 2921-2922.

[25] We note, however, that enforcement of the rate freeze rests with the Commission. TCI of Southeast Mississippi (Ocean Springs, Mississippi), DA 95-1747, ¶ ¶ 6-10 (Cab. Serv. Bur., released August 15, 1995)

[26] 47 C.F.R. § 76.923.

[27] 47 C.F.R. § 76.923(a).

[28] 47 C.F.R. § 76.932(a).

[29] *See Rate Order*, 8 FCC Rcd at 5806-7.

[30] 47 C.F.R. § 76.923(i).

[31] 47 C.F.R. § 76.923(b).

[32] 47 C.F.R. § 76.923(i).

[33] *See* 47 U.S.C. § 543(a)(2)(B) (1992).

[34] *Id.*

late such charges. In rare instances, however, certain equipment-related charges may be related only to the CPS tier, such as additional programming costs for channels only carried on the CPS tier, placing the charges under Commission jurisdiction. The City does not contest Warner's assertion that the additional outlet charges at issue are imposed only on CPS subscribers to recover programming costs associated with the CPS tier. Because the additional outlet charges are imposed only in connection with programming carried on the CPS tier, the Commission, not the City, has jurisdiction over this matter.[35] Under the facts of this case, the City should not have issued a ruling regarding these charges. Since the City did not have jurisdiction to reach the additional outlet charge, we remand this issue to the City so that it may modify its local rate order accordingly.

G. Community Service Fee

20. Warner has been charging subscribers what it refers to as a monthly "community service fee" in the amount of $1.63. Warner claims that the community service fee reflects its operating costs associated with meeting public, education and governmental ("PEG") access requirements imposed by the City. Warner argues that this fee should be considered a part of its franchise fee which, as an external cost, would allow Warner to continue to charge subscribers for the fee as a separate item on their bills, as it did until the City passed the local rate order at issue here. As an external cost, Warner added and itemized the fee on subscribers' bills in the same manner as its franchise fees.

21. The City responds that its franchise agreement with Warner was issued before 1984 and the fee is therefore statutorily precluded from being a franchise fee by the 1984 Cable Act. The City believes that Warner is charging the community service fee in an attempt to evade rate regulation. The City further claims that if Warner prevails on its appeal, Warner would collect revenue twice for the same PEG channels since it would be allowed both to externalize PEG costs when determining original maximum basic service rates and to continue to count PEG channels among the number of basic service channels used to establish maximum rates.

22. Franchise fees are accorded external cost treatment under our rules.[36] A cable operator's permitted per-channel charges for regulated programming services may be adjusted for changes in external costs, which are defined by the Commission's rules.[37] While our regulations provide that an operator may only adjust its charges to the extent that certain external cost increases exceed the rate of inflation, franchise fees can be fully recovered without regard to the treatment of inflation on Form 393. All other "external" costs must be internalized in an operator's initial rate calculations. Franchise fees are defined in the Communications Act as "any tax, fee, or assessment of any kind imposed by a franchising authority . . . on a cable operator or cable subscriber . . . solely because of their status as such."[38] The same provision of the Communications Act, however, specifically excludes from that definition "payments . . . made by the cable operator . . . for, or in support of, the use of, public, educational, or governmental [PEG] access facilities."[39] The "community service fee" at issue is in the nature of a payment made in support of PEG access facilities, which excludes it from the definition of franchise fee.[40] The distinction is evident on Warner subscriber bills, where it separately itemizes the franchise and "community service fee," thus recognizing the separate identity of each.[41] Therefore, the "community service fee" is not entitled to external cost treatment and the City's holding was reasonable.[42] Warner's appeal of this issue is denied.

H. Due Process

23. Finally, Warner contends that the City violated the Commission's due process rules in adopting the local rate order. Specifically, Warner states that our rules were violated by the City's actions in failing to provide Warner adequate opportunity to comment on the proposed rate order and refund; failing to provide Warner with a copy of the revised Form 393 prepared by the City's consultant; and failing to specifically approve Warner Hourly Service, on which its equipment and installation rates are based. The City responds by stating that Warner was given ample opportunity to participate in the rate-making process and that the Commission's due process rules were followed in all other respects.

24. Our rules require that a franchising authority must provide a reasonable opportunity for consideration of the views of interested parties.[43] Our rules also require the franchising authority to issue a written report if it disallows the operator's proposed rates.[44] The written report must affirmatively demonstrate why the operator's proposed rates are unreasonable and why the prescribed rates are reasonable.[45] There is no requirement that the franchising authority share any reports or revised Form 393s that it may have used in its rate review process. We do not require evidentiary hearings; although certainly if circumstances dictate, such hearings would be permitted. However, we deem it sufficient for the local authority to consider the written views of interested persons on issues raised about the operator's proposed rates.[46] Here, after exchanging several letters on issues raised by the parties, the City's Cable TV Commission (CTVC) prepared a recommendation and

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[35] *See* Dimension Cable Services (Irvine, California), DA 95-456 (Cab. Serv. Bur., released March 10, 1995).

[36] 47 C.F.R.§ 76.922(d)(2).

[37] *See* 47 C.F.R. § 76.922(d)(3).

[38] Section 622(g) of the Communications Act; 47 U.S.C. § 542(g).

[39] *Id.* The statutory exclusion of PEG fees from the definition of franchise fees applies only to PEG fees paid pursuant to a requirement of a franchise in effect on the date of enactment of Title VI of the Communications Act, October 30, 1984. *Id.* The franchise agreement between Warner and the City was entered into before 1984 and the statutory exclusion therefore applies.

[40] *Id.*

[41] *Id. See* 47 U.S.C. § 622(c)(2) and 47 C.F.R. § 76.985, under which a cable operator may identify as separate line items both franchise fees and PEG fees.

[42] *See* Warner Cable Communications of Cincinnati, Inc. (Cincinnati, Ohio), DA 95-550 (Cab. Serv. Bur., released March 21, 1995)

[43] 47 C.F.R. § 76.935.

[44] 47 C.F.R. § 76.936.

[45] *Rate Order*, 8 FCC Rcd at 5723-5724.

[46] *Rate Order*, 8 FCC Rcd at 5724, n.367.

provided a copy to both the City and Warner. Warner was given an opportunity to submit comments on the CTVC's recommendation. Even though Warner's comments were late, as were several of Warner's responses to City requests for additional information, the comments and responses were accepted and given full consideration by the City. The rate order also sets forth and affirmatively demonstrates the City's findings with regard to the issues that had been discussed previously. It is clear from the record below that the City conducted its review of Warner's Form 393 in compliance with the procedural safeguards established by the Commission. We conclude that, in considering Warner's Form 393 and in adopting its local rate order reflecting that consideration, the City acted reasonably and met our procedural requirements.

25. With respect to Warner's claim that it did not receive a copy of the City's revised Form 393, although franchising authorities are required to provide a written explanation for their rate orders, they are not required to provide operators with a copy of revised Form 393s.[47] Moreover, in this instance, the City provided Warner with the consultant's report, upon which the City relied upon in issuing its rate decision. It appears from the submissions that the parties were in close contact throughout the rate review process, at least through the exchange of several letters, and that the City informed Warner of the City's actions at every stage. We note that Warner was able to present arguments in its appeal addressing very specific and technical aspects of our rules as applied to the City's rate order. Upon review, we therefore conclude that Warner had enough information to understand the logic and to recognize the factual bases of the City's rate decision.

III. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED that Warner's appeal of the City's local rate order, regarding the City's authority to order refunds, external treatment of the community access fee and due process issues, IS DENIED.

27. IT IS FURTHER ORDERED that the City's local rate order, regarding the a la carte package, channel addition, bulk rates, in-house amplifiers, and additional outlet issues, IS REMANDED to the local franchising authority for further proceedings consistent with this opinion.

28. IT IS FURTHER ORDERED that Warner's appeal, regarding the satellite channel count, rate freeze and service call charge issues, IS DISMISSED.

29. IT IS FURTHER ORDERED that the stay granted pending review of Warner's appeal IS RESCINDED.

30. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by § 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[47] *See* 47 C.F.R. § 76.936; *Rate Order*, 8 FCC Rcd at 5715; Century Cable of Southern California (Brea and La Habra, California), DA 95-537 (Cab. Serv. Bur., released March 20, 1995).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-103

In the Matter of

Amendment of Section 73.202(b), RM-8659
Table of Allotments,
FM Broadcast Stations.
(Wyeville, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 7, 1995; Released: September 14, 1995

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 10 FCC Rcd 7234 (1995), proposing the allotment of Channel 267A to Wyeville, Wisconsin, as that community's first local service. The *Notice* was issued in response to a petition filed by Josephine Miracle ("Miracle"). Magnum Radio, Inc. ("Magnum") filed comments opposing the allotment at Wyeville. Miracle filed comments requesting the withdrawal of her petition for rule making.[1] No other comments or expressions of interest were received at the Commission for an allotment at Wyeville.

2. As stated in the appendix to the *Notice*, a showing of continuing interest is required before a channel will be allotted. It is the Commission's general policy to refrain from making a new allotment to a community absent an expression of interest. Therefore, since there has been no such interest here, we will dismiss Miracle's proposal.

3. Accordingly, IT IS ORDERED, That the petition of Josephine Miracle, requesting the allotment of Channel 267A to Wyeville, Wisconsin, IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] In accordance with Section 1.420(j) of the Commission's Rules, Miracle submitted a statement that she has not received or been promised any consideration for the withdrawal of her petition for rule making for Wyeville, Wisconsin.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Fairbanks Communications, Inc. CSR- 4567-T
d/b/a Leadership Cablevision

Petition for Waiver of Section 76.502
of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: September 6, 1995; Released: September 14, 1995

By the Deputy Chief, Cable Services Bureau:

1. Fairbanks Communications, Inc., d/b/a Leadership Cablevision ("Fairbanks") in the above captioned proceeding, has requested a waiver of 47 C.F.R. §76.502, the Commission's anti-trafficking rule, for one cable system in Florida.[1] Fairbanks seeks this waiver to assure that the consummation of a transaction with Olympus Communications, L.P. ("Olympus")[2] involving the one cable system that it has controlled for less than three years will not violate the anti-trafficking rule. Fairbanks submits that a waiver is warranted because more than two-thirds of the subscribers of the systems to be sold are served by systems which have been owned or controlled by Fairbanks for more than three years. The request is unopposed.

2. Section 76.502 of the Commission's rules implements Section 617 of the Communications Act, as amended, that, with certain exceptions, restricts the ability of a cable operator to sell or otherwise transfer ownership in a cable system within a 36 month period following either the acquisition or initial construction of the system.[3] The Commission has broad discretion to grant waivers of the holding requirement.[4]

3. The three-year holding requirement rule, and the underlying statutory provision, are aimed at restricting transactions and other transfers that are likely to adversely affect cable rates or service in the local franchise area, and are not intended to inhibit investment in the cable industry or delay or disrupt legitimate transactions.[5] Recently, the Commission stated that unless a transaction raises serious concerns on its face or any objections filed provide other public interest bases for concern, requests for waiver of the three-year holding requirement will generally be looked on favorably.[6] The Commission also has determined that waiver applications will be looked upon favorably if two-thirds or more of the MSO's subscribers are served by systems owned for three years or more, and if the MSO transfers several systems in a single transaction in which two-thirds of the subscribers of the systems being transferred are served by systems the MSO owned for three or more years.[7]

4. Fairbanks states the following facts in support of its petition. Fairbanks operates seven cable television systems in several communities in Palm Beach County, Florida.[8] Of the 45,618 subscribers served by the seven cable systems, 43,400 or 95.1 percent have been served by Fairbanks for more than three years; 2,218 subscribers, or 4.9 percent, are part of the Broken Sound system which was purchased by Fairbanks earlier this year. Fairbanks entered into an "Asset Purchase Agreement" with Olympus on or about June 8, 1995, to sell its Florida cable systems. The parties are currently filing for local approval of the sale,[9] and anticipate closing the transaction sometime in October, 1995. Fairbanks submits that the Commission should grant the requested relief because more than two-thirds of its subscribers, over 95 percent in this instance, have been held for over three years.

5. We will grant Fairbanks's waiver request with respect to the Broken Sound, Florida cable system. Fairbanks has sufficiently demonstrated that two-thirds or more of its subscribers subject to the proposed transaction will have been held for more than three years. We believe that the grant of the waiver and the transfer would not adversely affect the policies underlying the anti-trafficking rule and are not expected to adversely affect cable rates or services in the affected franchise areas. Moreover, no oppositions have been filed against the waiver or concerning the proposed transaction. The waiver is therefore granted conditioned upon the approval of the transfer to Olympus by the relevant local franchising authorities, to the extent that is required by the franchise agreement.[10]

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[1] The cable system subject to the transaction, and held less than three years, is the Broken Sound system (FL 0927) which was acquired in January of this year.

[2] Olympus Communications, L.P.'s general partner is owned by Adelphia Communications.

[3] 47 C.F.R. § 76.502; Section 617 of the Communications Act of 1934, as amended, 47 U.S.C. § 537.

[4] 47 U.S.C. § 537(d); *see also Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, (Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions), First Report and Order*, ¶ 78, 8 FCC Rcd 6828, 6839 (1993), *recon. granted in part and denied in part, Memorandum Opinion and Order on Reconsideration of the First Report and Order*, 10 FCC Rcd 4654 (1995); 47 C.F.R. § 76.502(g).

[5] *First Report and Order, id* at ¶ ¶ 11, 21 & 36, 8 FCC Rcd at 6830-31, 6833.

[6] *Memorandum Opinion and Order on Reconsideration of the First Report and Order*, 10 FCC Rcd at 4687.

[7] 8 FCC Rcd at 6836; 47 C.F.R. § 76.502(g)(1).

[8] Aside from Broken Sound, the other cable systems subject to the sale include: (1) Delray Beach (FL 0329); (2) Gulfstream (FL 0330); (3) Palm Beach Co. (FL 0331); (4) Ocean Ridge (FL 0587); (5) Boyton Beach (FL 1073); and (6) Caloosa, Florida (FL 1103).

[9] Fairbanks notes that it will provide the Commission copies of the approval of Palm Beach County to transfer the system when a decision is rendered.

[10] *See* 8 FCC Rcd at 6839 ("[T]he grant of .... conditional waivers will enhance the speed and efficiency of the waiver process, without undermining the discretion of the local franchising authority to approve or disapprove a proposed transfer, especially where multiple franchise authority approvals are necessary.") Whether a local transfer approval is required is a

6. In view of the above, IT IS ORDERED that, the captioned request for waiver of 47 C.F.R. §76.502 filed by Fairbanks Communications, Inc. IS CONDITIONALLY GRANTED upon approval of the transfers by the relevant local franchising authorities.

7. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

matter of local law and the franchise agreement. Fairbanks has indicated that approval by the City of Boca Raton, wherein the Broken Sound system resides, is not required.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Grand Strand Broadcasting Corporation — File Nos. BR-880728UB, BRH-880728YE

For Renewal of License of
Stations WKZQ(AM)/WKZQ-FM
Myrtle Beach, South Carolina

MEMORANDUM OPINION AND ORDER

Adopted: August 9, 1995; Released: September 14, 1995

By the Commission:

I. INTRODUCTION

1. The Commission has under consideration: (1) its decision in *Certain Broadcast Stations in the State of South Carolina*, 5 FCC Rcd 1704 (1990) (*"South Carolina"*) to grant the renewal applications of Stations WKZQ(AM)/WKZQ-FM, Myrtle Beach, South Carolina; (2) a Petition for Reconsideration of that decision filed by the South Carolina State Conference of Branches of the NAACP (NAACP) and the National Black Media Coalition (NBMC); and (3) an opposition filed by Grand Strand Broadcasting Corporation, licensee of Stations WKZQ(AM)/WKZQ-FM. For the reasons that follow, we dismiss the NBMC's Petition for Reconsideration and deny the NAACP's Petition for Reconsideration.

2. In *South Carolina*, the Commission concluded that no substantial and material question of fact existed regarding these stations and that grant of their renewal applications would serve the public interest. Therefore we denied the NAACP's petition to deny and the NBMC's informal objection. We did, however, find that Grand Strand's EEO efforts during the license term were deficient and, on that basis, granted the license renewal applications subject to a short term renewal, reporting conditions and a Notice of Apparent Liability for $10,000.[1] *South Carolina*, 5 FCC Rcd at 1707-1708.

II. STANDING

3. The NBMC failed to support the petition to deny with an affidavit from a resident of WKZQ(AM)/WKZQ-FM's service area or a listener of the stations. Thus, we held in *South Carolina* that the NBMC lacked standing to file a petition to deny with respect to the renewal applications of Stations WKZQ(AM)/WKZQ-FM, and we treated the NBMC as an informal objector. The NBMC does not challenge our holding in this regard. As an informal objector, the NBMC has no standing to seek reconsideration of the *Order*. 47 C.F.R. § 1.106(b)(1). *License Renewal Applications*, 7 FCC Rcd 6045 (1992). We, therefore, dismiss its petition. However, as the Petition for Reconsideration was filed by both the NBMC and the NAACP, which has appropriate standing, we will consider the arguments raised therein, recognizing only the NAACP as the petitioner.

III. DISCUSSION

4. Reconsideration is appropriate only where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom., Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966) (*WWIZ*); 47 C.F.R. § 1.106(c). Applying this standard, we conclude that reconsideration is not warranted with respect to our disposition of the license renewal applications for WKZQ(AM)/WKZQ-FM.

5. The NAACP does not dispute any factual finding concerning the stations. Rather, the NAACP faults the Commission's decision to consider the following as mitigating factors: the stations' record of hiring, promoting and employing minorities, and the presence of minorities in some of their applicant pools. Additionally, the NAACP submits that the licensee's record could not have occurred absent discrimination, according to the statistics cited by the NAACP.[2] However, in *South Carolina*, we fully considered and rejected these arguments. Moreover, in *License Renewal Applications* and *Pasco Pinellas Broadcasting*, 8 FCC Rcd 398 (1993), *aff'd sub nom. Florida State Conference of NAACP v. FCC*, 24 F.3d 271 (D.C. Cir. 1994), the Commission rejected similar statistical analyses, holding that calculations based on computations used in cases brought under Title VII of the Civil Rights Act instead of the Commission's EEO Rules are not determinative. The United States Court of Appeals for the D. C. Circuit has refused to overturn our position in this regard, deferring instead to the Commission's discretion. *Florida State Conference of NAACP v. FCC*, 24 F.3d at 274, n.4. As we have repeatedly stated, reconsideration will not be granted for the purpose of debating matters on which we have already deliberated and spoken. *See, e.g., Isis Broadcast Group*, 8 FCC Rcd 24 (Rev. Bd. 1992), *citing WWIZ*.

IV. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by the NAACP and the NBMC IS DISMISSED as to the NBMC and as to the NAACP IS DENIED.

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[1] The licensee of WKZQ(AM)/WKZQ-FM paid the forfeiture in full.

[2] The NAACP also contends that there are two major flaws in footnote eight in *South Carolina*, which states, in relevant part, that, "if a licensee obtains a meaningful pool of referrals and applicants from *e.g.*, *exclusive* reliance on general sources, it will not be faulted for failing to contact minority specific sources." *South Carolina*, 5 FCC Rcd at 1709 n.8. The NAACP requests both clarification and modification of footnote eight. We reject the NAACP's request because this footnote does not concern Stations WKZQ(AM)/WKZQ-FM.

7. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail – Return Receipt Requested, copies of this *Memorandum Opinion and Order* to the NAACP, the NBMC and the licensee of Stations WKZQ(AM)/WKZQ-FM.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Abundant Life, Inc. for a
Construction Permit for a
New FM Station
Hattiesburg, Mississipi

MEMORANDUM OPINION AND ORDER

Adopted: August 18, 1995; Released: September 14, 1995

By the Commission:

I. INTRODUCTION

1. The Commission has before it an Application for Review, filed on behalf of Abundant Life, Inc. ("ABI"), a former applicant for a new FM station at Hattiesburg, Mississipi, an Opposition filed on behalf of Unity Broadcasters ("Unity"), the remaining applicant for the new FM Hattiesburg construction permit, ABI's Reply to the Opposition, and related pleadings. For the reasons discussed below, we grant the Application for Review and reinstate ABI's application *nunc pro tunc*.

II. BACKGROUND

2. ABI's application was dismissed by the Chief, FM Branch, for failure to submit its hearing fee in accordance with the deadline established by the May 14, 1993, Public Notice. That public notice announced that ABI's application was mutually exclusive with the applications filed by Unity and Community Broadcasting Company,[1] and established July 19, 1993, as the hearing fee deadline. The Managing Director affirmed ABI's dismissal, and denied its petition for reconsideration. ABI seeks reversal of the Managing Director's decision, acceptance of its hearing fee and reinstatement of its application *nunc pro tunc*.

3. ABI states that the Notice of Acceptance, which established the applicable hearing fee deadline, was released three days before the amendment of right period expired on May 17, 1993. ABI contends that release of the Notice of Acceptance was premature, and thus inconsistent with Commission procedures. In support of its position, ABI cites to language in the *Report and Order* that initially adopted the Commission's FM "hard look" window processing procedures, which stated that Notices of Acceptance would be released following the passage of the amendment of right period. *See Amendment of Sections 73.3572 and 73.3573 relating to Processing of FM and TV Broadcast Applications* ("*Hard Look* "Order), 58 RR 2d 776, 785, *recon. denied*, 59 RR 2d 100 (1985), *aff'd, Hilding v. FCC*, 835 F.d 1435 (9th Cir. 1985). ABI further contends that the Commission's decision to relax the FM "hard look" processing guidelines, which was adopted before ABI filed its application, "did not change the requirement that the acceptance notice be issued *after* the close of the amendment as of right period."[2] *See Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial Broadcast Applications*, 7 FCC Rcd 5074 (1992), *recon. denied*, 8 FCC Rcd 7572 (1993) (*"Soft Look Order"*). ABI maintains that it exercised reasonable diligence in its attempts to ascertain, and comply with, the hearing fee deadline by checking all the FCC Public Notices from May 17, 1993 (the date the amendment of right period ended) through July 6, 1993.[3]

4. Unity opposes ABI's application. Unity characterizes ABI's assertions merely as an attempt to excuse ABI's inaccurate interpretation of Commission procedures and limited search of the FCC's official Public Notices. Unity states that the Managing Director correctly found that release of the May 14, 1993, Public Notice "was neither defective nor inconsistent with the Commission's procedures."[4] Unity further states that it is not unusual for the FCC to release Public Notices announcing the acceptance of applications prior to the expiration of the amendment of right period.

III. DISCUSSION

5. The sanction for a late filed fee is immediate dismissal of the subject application. *See Establishment of a Fee Collection Program*, 2 FCC Rcd 947, 956-57 (1987); *see also* 47 U.S.C. Section 158(c)(2); 47 C.F.R. Sections 1.1107(b); 1.1110(a)(1). The Commission's authority to adopt exacting procedural standards and deadlines -- and to enforce such standards and deadlines by dismissing non-complying applications -- clearly has been recognized. *See, e.g., Hispanic Information and Telecommunications Network v. FCC*, 865 F.2d 1289, 1295 (D.C. Cir. 1989); *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3-4 (1987); *Salzer v. FCC*, 778 F.2d 869, 871-72 (D.C. Cir. 1985). Where, as here, the sanction for non-compliance is dismissal, fundamental fairness requires that the Commission afford applicants advance, clear and adequate notice of its requirements. In other words, "the Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules. Otherwise the practice of administrative law would come to resemble 'Russian Roulette.'" *See Satellite Broadcasting Co. v. FCC*, 824 F.2d at 4. As discussed below, we find that ABI's interpretation of the Commission's procedures, in general, and the timing of the release of the Notices of Acceptance, in particular, was reasonable, given the language of both the *Hard Look Order* and the *Soft Look Order*. Thus, we find that ABI should not be penalized for its reasonable reliance on the

[1] Community Broadcasting Company decided not to prosecute its application, did not submit a hearing fee, and thus was dismissed for failure to pay its fee.

[2] ABI's Application for Review at 11.

[3] In addition, ABI argues that the doctrine of equitable estoppel should be invoked to bar the Commission's enforcement of the hearing fee deadline, because ABI's counsel received misinformation concerning the hearing fee deadline from the Commission's staff, as well as the Commission's publicly available database. Given our disposition herein, we need not address ABI's estoppel argument.

[4] Unity's Opposition at 5.

Commission's pronouncements regarding its procedures, and we will therefore reinstate ABI's application *nunc pro tunc*.

6. At the outset, we note that the Commission's rules do not require that Notices of Acceptance of FM applications be issued with reference to any specific time, including after the close of the amendment of right period. Rather, section 73.3573(g) of the Commission's rules, 47 C.F.R. Section 73.3573(g), merely states that such Notices will be released "periodically."[5] However, as ABI correctly notes, the Commission, in the 1985 *Hard Look Order*, as well as the 1992 *Soft Look Order*, stated that Notices of Acceptance of FM applications will issue after close the amendment of right period.

7. In the 1985 *Hard Look Order*, the Commission unequivocally stated that Notices of Acceptance of FM applications would be issued following the conclusion of the amendment of right period and the staff's engineering review of the application(s). Specifically, the *Hard Look Order* provided that:

> *Following the passage of the 30-day amendment period,* the application and any amendments will be studied for acceptability, i.e., compliance with the technical requirements for FM facilities. If the application is found acceptable, it will be placed on a publicly-released "Notice of Acceptability" inviting the filings of petitions to deny.

58 RR 2d at 785 (emphasis added). In 1990, a Public Notice modified that procedure, by explicitly authorizing the staff to issue the Notices of Acceptance "prior to the staff's engineering study" in order to expedite the processing of applications.[6] Although the Commission stated in that Public Notice that the issuance of a Notice of Acceptance may precede the staff engineering review, it did not purport nor did it intend to effect any other changes regarding the timing of such Notices (i.e., it did not state that the Notices additionally may precede the close of the amendment of right period).

8. In the 1992 *Soft Look Order*, which was in effect at the time ABI filed its application, the Commission again described its practice of releasing Public Notices of Acceptance after the close of amendment of right periods. Specifically, the Commission stated that, although it was relaxing the FM hard look processing guidelines and the handling of defective applications,[7] it did "not intend to change the overall filing procedures and policies applicable to the commercial FM service,"[8] as described in the underlying *Notice of Proposed Rulemaking*, 6 FCC Rcd 7265 (1992). The *Notice of Proposed Rulemaking* described the Commission's procedures as follows: Applications free of tender defects are placed on a publicly released "Notice of Tenderability." This Notice triggers a 30-day period in which applicants with substantially complete applications may submit amendments as a matter of right . . . *After the amendment of right period, applications proceed to the second stage of review.* Applications that were found "tenderable" are placed on a publicly released "Notice of Acceptance," which triggers the time for filing of Petitions to Deny pursuant to Section 309 of the Communications Act. Thereafter, the staff studies the applications for "acceptability," i.e., compliance with core technical and legal requirements for FM facilities.

Id. at 7267 (emphasis added).

9. The Managing Director characterized the Commission's pronouncements as merely representing a generalized description of its processing procedures, which neither mandated nor governed the particular timing of public notice releases. We find, however, that ABI's reliance upon, and interpretation of, the unambiguous language of both the *Hard Look Order* and the *Soft Look Order*, as well as the underlying *Notice of Proposed Rulemaking*, was reasonable. Given the Commission's past pronouncements describing the Commission's procedures pursuant to section 73.3573(g), we find that ABI lacked adequate notice that the Notice of Acceptance that established the hearing fee deadline might be issued prior to end of the amendment of right period. Therefore, we do not find ABI dilatory in restricting its search of the daily releases of the Commission's Public Notices from May 17, 1993, the date the amendment of right period expired, onward. Rather, ABI reasonably relied upon the Commission's pronouncements in so restricting its search, and unfortunately missed and consequently failed to file its fee payment in accordance with the deadline established by the applicable May 14, 1993, Public Notice. We cannot penalize ABI for reasonably relying upon, nor can we disavow, the Commission's own pronouncements regarding the release of Notices of Acceptance.

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[5] Section 73.3573(g) provides in pertinent part:

> (2) All applications received during the appropriate filing period or "window" which are found to be mutually exclusive will be designated for hearing . . . The FCC will periodically release a Public Notice listing applications pending hearings or grant and announcing a date (not less than 30 days after issuance) by which petitions to deny must be filed.
>
> (i) In addition to announcing the acceptance of mutually exclusive applications and establishing a date for the filing of petitions to deny such applications, the public notice referred to in paragraph (g)(2) will also announce the date on which all mutually exclusive applicants will be required to pay the hearing fee . . . The date for fee payment shall be at least 30 days after the date established for petitions to deny.

[6] *See Public Notice*, "The Commission Announces Four Policy Changes in Processing of Commercial FM Construction Permit Applications for New Facilities," 5 FCC Rcd 990, 990 (1990).

[7] The Commission's relaxation of the "hard look" rules established minimum tenderability requirements and expanded applicants' opportunities to correct defective applications, such that the Commission acknowledged that Notices of Tenderability and Acceptance no longer signified compliance with the tenderability or acceptance criteria. *See Soft Look Order*, 7 FCC Rcd at 5076, n.13. Indeed, the Commission described the Notice of Acceptance as merely serving as "the mechanism for permitting petitions to deny." *Id.*

[8] *Soft Look Order*, *Id.* at 5075, and n.8.

IV. CONCLUSION

10. Accordingly, based on all of the foregoing reasons, IT IS ORDERED, That the decision of the Managing Director is REVERSED, That the Application for Review, filed by ABI, IS GRANTED, and that ABI's Application for a new FM station is REINSTATED *NUNC PRO TUNC*.

11. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau SHALL TAKE appropriate steps to implement this decision.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

FAIR OAKS CELLULAR PARTNERS — File No. 10960-CL-P-549-A-89

for Authorization to Construct and Operate a New Domestic Public Cellular Radio Telecommunications Service on Frequency Block A to serve Rural Service Area No. 549 New Hampshire 2 - Carroll

ORDER

Adopted: August 4, 1995; Released: August 9, 1995

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. In this order, we address petitions for reconsideration filed by Optima Cellular Partnership (Optima) on January 7, 1993 and Schuylkill Mobile Fone, Inc. (Schuylkill) on December 31, 1992. Optima and Schuylkill (jointly "Petitioners") request that the Commission reconsider its designation of Fair Oaks Cellular Partners (Fair Oaks) as the tentative selectee for a license to provide cellular service in Rural Service Area (RSA) No. 549 on frequency block A. For the reasons discussed below, we deny the petitions for reconsideration and grant Fair Oaks' license application.

2. On December 20, 1989, the Commission held a cellular lottery for non-wireline applicants in the New Hampshire 2 RSA (NH 2 RSA). Fair Oaks won the cellular lottery for the NH 2 RSA.[1] Petitioners were unsuccessful applicants in the lottery. On May 4, 1990, the Common Carrier Bureau announced Fair Oaks as the tentative selectee for the NH 2 RSA pursuant to its amended application.[2]

3. Petitioners filed timely Petitions to Deny against Fair Oaks on June 21, 1990. Petitioners alleged that the firm financial commitment letter contained in Fair Oaks' initial application failed to meet the requirements of Section 22.917(c)(5) of the Commission's rules, which sets forth the required elements of the firm financial commitment letter to be submitted with each RSA applicant's application.[3] According toPetitioners, the commitment letter provided by Cellular Equipment Management Services (CEMS) for Fair Oaks was defective because it did not establish that CEMS was the financial arm of a capital equipment supplier with the funds to support its commitments.

4. Fair Oaks filed a Consolidated Opposition to the Petitions to Deny on July 23, 1990, stating that the CEMS letter complied with Section 22.917(c)(5) because CEMS was the financial arm of a capital equipment supplier. Fair Oaks also amended its application by submitting a firm financial commitment letter from Motorola, Inc. (Motorola). On December 3, 1990, the Common Carrier Bureau Mobile Services Division (MSD) requested additional information from Fair Oaks concerning the CEMS letter. Specifically, MSD requested information concerning CEMS's owners, directors, officers and key management personnel and its status as an incorporated entity; information concerning the number and dollar amount of financial commitments provided to cellular applicants as of November 10, 1988; and audited balance sheets and other financial statements for 1988 through 1990. MSD also requested information concerning whether CEMS or Plexsys Corporation filed for bankruptcy or creditor protection between 1988 and 1990; who filed Fair Oaks' application; information concerning the circulation of a partnership offering entitled "Organizational Concept & Funding Proposal"; and information concerning Computerized Cellular Engineering, Inc.'s (CCE) owners, directors, officers and key management personnel on November 10, 1988 and CCE's relationship to CEMS.

5. Fair Oaks responded to MSD in two separate filings on January 18, 1991 and January 22, 1991. Fair Oaks responded to the information request by supplying all the requested information except CEMS's audited balance sheets and financial information from 1988 through 1990. Although Fair Oaks requested the balance sheets and financial information, CEMS did not make them available to Fair Oaks. CEMS responded to Fair Oaks' requests by submitting an unaudited balance sheet for 1990 to Fair Oaks.

6. On October 15, 1991, the Commission granted the petitions to deny and dismissed Fair Oaks' application.[4] The Commission stated that Fair Oaks did not submit an adequate firm financial commitment letter under Section 22.917(c)(5) when it filed its application and that Fair Oaks failed to provide sufficient support in its response to the MSD information request. The Commission refused to

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[1] Common Carrier Public Mobile Services Information, Report No. CL-90-69 (Report No. CL-90-69) (December 21, 1989).

[2] Common Carrier Public Mobile Services Information, Report No. CL-90-167 (May 4, 1990). Pursuant to Report No. CL-90-69, the forty-five (45) day filing period for Petitions to Deny began when the tentative selectee was announced. *See also* 47 C.F.R. § 1.823(b)(2).

[3] Section 22.917(c)(5) requires the commitment letter to be provided by a state or federally chartered bank or savings and loan, another recognized financial institution, or the financial arm of a capital equipment supplier. The letter must state that: (a) the lender has determined the applicant to be creditworthy after an examination of the applicant's financial condition; (b) the lender has examined the financial viability of each RSA proposal for which the applicant intends to use the commitment; (c) the lender is committed to providing a sum certain to the applicant; (d) the lender's willingness to enter into the commitment is based solely on its relationship with the applicant; and (e) the commitment is not in any way guaranteed by any entity other than the applicant. Although Section 22.917 has been rewritten as Section 22.937 in the Part 22 Rewrite, all cites will be to Section 22.917.

[4] *Butte Cellular Group*, 6 FCC Rcd 6745, 6746 (1991).

accept the Motorola letter because it was not filed with Fair Oaks' initial application as required by Section 22.917.[5]

7. Following the Commission's dismissal of its application, Fair Oaks filed a Petition for Reconsideration and Reinstatement Nunc Pro Tunc, in which it argued that the provisions of Section 22.917(c)(5) were unenforceable against Fair Oaks because the Commission had failed to obtain approval of the rule from the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1980 (PRA).[6] Because Section 22.917(c)(5) was not approved by OMB, Fair Oaks argued, the Commission was precluded from dismissing Fair Oaks' application for failure to comply with the requirements of the rule.

8. In our *Kent Foster* decision, we concluded that the arguments raised by Fair Oaks and other similarly situated applicants with respect to Section 22.917(c)(5) had merit, and that the rule could not be enforced against these applicants because of the Commission's failure to comply with the PRA.[7] Although a proposed version of the rule had received OMB approval, we concluded that the final version of Section 22.917(c)(5) was "so substantively and materially modified as to render the rule, as a whole, unenforceable under the PRA."[8] Accordingly, we reinstated Fair Oaks' application and restored its status as the tentative selectee for the NH 2 RSA.[9]

9. Petitioners filed the instant Petitions for Reconsideration (Petitions) of the order on December 31, 1992 and January 7, 1993, requesting that Fair Oaks' application again be dismissed and that another lottery be held for the NH 2 RSA. Fair Oaks opposed the petitions by filing Motions to Strike and Contingent Oppositions to the Petitions for Reconsideration. Petitioners filed replies in response to these pleadings.

II. CONTENTIONS OF THE PARTIES

10. On reconsideration, Petitioners argue that notwithstanding the unenforceability of Section 22.917(c)(5), alternative grounds exist to dismiss Fair Oaks' initial application. Optima argues that the Commission cannot reinstate Fair Oaks' application where alternate grounds for dismissal exist.[10] Schuylkill notes that under the remaining provisions of Section 22.917(c) that were not invalidated by the PRA, Fair Oaks was required to show either a firm financial commitment or available financial resources necessary to construct and operate for one year pursuant to Section 22.917(c)(1) of the Commission's rules.[11] Schuylkill alleges that Fair Oaks failed to provide financing for the realistic and prudent estimate of the costs of construction, operating, and other initial expenses for one year, as required by Section 22.917(c)(4) of the Commission's rules.[12] Schuylkill also alleges that Fair Oaks violated Section 22.923(a)(7) of the Commission's rules by failing to attach an exhibit showing the cost of construction and demonstrating how it planned to finance construction.[13]

11. Petitioners also argue that Fair Oaks' application should be dismissed on the grounds that Fair Oaks provided insufficient responses to MSD's requests for additional information regarding the CEMS letter. Schuylkill alleges that Fair Oaks violated Commission rules by failing to submit documentation to substantiate that CEMS was a *bona fide* financial arm of a capital equipment supplier as requested by MSD.[14] Optima similarly asserts that Fair Oaks' failure to submit additional documentation in response to the MSD information request is a disqualifying defect.[15]

12. In response, Fair Oaks first contends that the Petitions are premature and unauthorized pleadings under Sections 1.106 and 1.823(c) of the Commission's rules.[16] Fair Oaks argues that the Commission's reinstatement of Fair Oaks' application and redesignation of Fair Oaks as a tentative selectee were not final Commission actions subject to reconsideration.

13. Fair Oaks also denies that alternative grounds exist for dismissal of its application and contends that its initial application fully complied with the Commission's rules. Fair Oaks argues that its initial reliance upon the CEMS commitment letter was reasonable and in good faith, and that it complied with MSD information requests for further information about CEMS to the best of its ability.[17] Fair Oaks further contends that, if the Commission determines that the CEMS letter was not a sufficient financial commitment, Fair Oaks should be allowed to amend its application to submit the Motorola letter.[18] Finally, Fair Oaks asserts that a Commission's refusal to accept the Motorola letter violates Section 3512 of the PRA because it penalizes Fair Oaks for failing to provide information in response to a request that was not approved by OMB.[19]

III. DISCUSSION

14. As a threshold matter, we reject Fair Oaks' contention that the petitions before us are premature. Section 1.106(b)(1) permits a party to file a petition for reconsideration of any Commission action that adversely affects the party's interests.[20] Furthermore, Section 405 of the Communications Act, as amended, confers a statutory right to petition for reconsideration.[21] As noted above, Petitioners were unsuccessful applicants in the NH 2 RSA lottery. When the Commission reinstated Fair Oaks as the tentativep selectee for NH 2 RSA, Petitioners' right to participate in a second lottery for the license was extin-

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[5] *Butte Cellular Group, Id.*, (*citing Fourth Report and Order*, 4 FCC Rcd 2542, 2545 (1988)).
[6] 44 U.S.C. §§ 3501 - 3520.
[7] *Kent S. Foster*, 7 FCC Rcd 7971 (1992).
[8] *Id.* at 7972.
[9] *Id.* This order also reinstated several other applications on the same grounds.
[10] Optima Petition at 6 (*citing Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235 (D.C. Cir. 1985) and *Sun Communications*, 4 FCC Rcd 6429 (1989)).
[11] Schuylkill Petition at 7.
[12] *Id.* at 6.
[13] *Id.* at 6, 10.
[14] *Id.* at 9.
[15] Optima Petition at 2.
[16] Fair Oaks Motion to Strike at 1.
[17] Fair Oaks Opposition at 5-6.
[18] *Id.* at 8-12.
[19] *Id.* at 14-15.
[20] 47 C.F.R. § 1.106(b)(1).
[21] 47 U.S.C. § 405.

guished. This plainly constituted an action adverse to Petitioners' interests entitling them to request reconsideration.[22]

15. Addressing Petitioners' arguments on the merits, we find that Petitioners have failed to demonstrate the existence of alternative grounds for dismissing Fair Oaks' application. Petitioners contend that the CEMS commitment letter is defective even if we do not apply the specific requirements of Section 22.917(c)(5). We disagree. While it is true, as Petitioners contend, that Fair Oaks' application remains subject to the remainder of Section 22.917(c), which was not invalidated by the PRA, we find no basis in the record to conclude that the CEMS commitment letter violated any provision other than Section 22.917(c)(5). On its face, the letter meets the requirement of Section 22.917(c)(1) that a firm financial commitment letter be submitted with the application, and we find the letter commits to provide financing to cover the reasonable and prudent estimated cost of construction, operating, and other initial expenses as required by Section 22.917(c)(4). Additionally, we find that Fair Oaks submitted the particulars regarding the cost of construction in accordance with Section 22.923(a)(7).[23]

16. Petitioners' contention that CEMS was unqualified is premised on Fair Oaks' failure to comply with Section 22.917(c)(5), which we are precluded from applying here. Moreover, Petitioners have not alleged that Fair Oaks knew CEMS was unqualified when Fair Oaks submitted the CEMS letter with its application. We conclude that the CEMS letter alone does not give rise to an inference of bad faith, and that Petitioners have presented no independent evidence of intentional misconduct by Fair Oaks.

17. We also disagree with Petitioners' assertions that Fair Oaks' failure to provide the audited balance sheets and financial statements in its responses to MSD's requests for supplemental information rendered the application defective. While Fair Oaks' responses failed to persuade MSD that it had complied with Section 22.917(c)(5), we see no evidence to suggest that Fair Oaks' intentionally provided false or incomplete responses to MSD.

18. Having affirmed our reinstatement of Fair Oaks as tentative selectee, we further conclude that Fair Oaks should be allowed to use the Motorola letter rather than the CEMS letter to demonstrate its financial qualification to be the NH 2 RSA licensee. Although we ordinarily do not allow an RSA applicant to substitute a new commitment letter if the initial letter was defective,[24] we believe that unique circumstances exist that justify such an amendment in this case. First, because we have concluded that Section 22.917(c)(5) is unenforceable against Fair Oaks, we have no basis to conclude that the CEMS letter was defective. Second, as we noted in *Kent Foster*, when application of a Commission rule violates the PRA, we must permit the applicant to prove or satisfy the legal conditions in any reasonable manner.[25] We conclude that our reinstatement of Fair Oaks as tentative selectee entitles it to prove its financial qualifications in any reasonable manner, including by reliance on the Motorola letter, which meets the requirements set forth in Sections 22.923(a)(7) and 22.917(c). We therefore grant Fair Oaks' request to amend its application to include the Motorola letter, and find Fair Oaks to be financially qualified for grant of the NH 2 RSA license on this basis.

IV. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that pursuant to Sections 4(i), 303(r) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 405 that the Petitions for Reconsideration filed by Optima Cellular Partnership on January 7, 1993 and Schuylkill Mobile Fone, Inc. on December 31, 1992 ARE DENIED.

20. IT IS FURTHER ORDERED that the Wireless Telecommunications Bureau shall grant the application of Fair Oaks Cellular Partners to be the licensee of the New Hampshire 2 RSA.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[22] *See* 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(b)(1).

[23] *See* Fair Oaks' Application at Exhibit 8.

[24] *Fourth Report and Order*, 4 FCC Rcd at 2545; Bendel Broadcasting Corporation, 98 F.C.C.2d 164, 169-170 (1984); *See* 47 C.F.R. § 22.918(b) (1989).

[25] *Kent Foster, supra*, 7 FCC Rcd at 7972 n.10. *See* 5 C.F.R. § 1320.5(b); *Dana Communications, LTD.*, 7 FCC Rcd 1878, 1879 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

WT Docket No. 95-132

In the Matter of

Amendment of Part 80 of the Rules Concerning U.S. Coast Guard Vessel Traffic Services (VTS) Systems in Sault Ste. Marie, Michigan; San Francisco, California; and Morgan City, Louisiana	RM-8500, 8592, 8598

NOTICE OF PROPOSED RULE MAKING

Adopted: August 9, 1995; Released: August 30, 1995

Comment Date: October 23, 1995
Reply Comment Date: November 7, 1995

By the Commission:

I. INTRODUCTION

1. This *Notice of Proposed Rule Making* (*NPRM*) proposes to amend Part 80 of the Commission's Rules, 47 C.F.R. Part 80, to modify the rules concerning the United States Coast Guard (Coast Guard) designated radio protection areas for mandatory Vessel Traffic Services (VTS). At the request of the Coast Guard we propose to add Sault Ste. Marie, Michigan, to the designated radio protection areas for mandatory VTS and establish marine VHF Channel 12 (156.600 MHz) as the VTS frequency for Sault Ste. Marie; modify the San Francisco VTS by designating Channel 12 (156.600 MHz) as a second VTS frequency; and add Morgan City, Louisiana, (commonly referred to as Berwick Bay) to the designated radio protection areas for mandatory VTS and establish marine Channel 11 (156.550 MHz) as the VTS frequency for Berwick Bay.[1] Public Notice of the Coast Guard's petition, RM-8500, was given on July 26, 1994 (Report No. 2023), and public notice of Coast Guard's petitions, RM-8592, RM-8598, was given on February 10, 1995 (Report No. 2057). No comments were filed in response to these Public Notices.

II. BACKGROUND

2. The Coast Guard uses VTS systems as an advisory communications service to coordinate vessel movement and prevent collisions in large, busy port areas. Vessels report, by voice, information related to position, navigation and conditions affecting navigation, to the Coast Guard, which tracks the vessels' movements. VTS systems use VHF marine channels dedicated to their operations in Coast Guard designated VTS areas. The Coast Guard requires that certain large ships, tow and tug boats, dredges, and floating platforms participate in VTS systems.

3. The Commission amended its Rules in 1975, at the Coast Guard's request, to make frequencies available in certain designated areas exclusively for VTS communications.[2] Since then, we have added a number of VTS protection areas. Currently, Section 80.383 of the Rules, 47 C.F.R. § 80.383, lists five areas - Seattle, New York, New Orleans, Houston and San Francisco - as Coast Guard designated VTS areas. Frequencies allotted for VTS communications are available for assignment outside of VTS designated areas for other purposes on a noninterference basis.[3]

III. DISCUSSION

4. Under the Ports and Waterways Safety Act of 1972,[4] as amended by the Port and Tanker Safety Act of 1978[5] and the Oil Pollution Act of 1990,[6] the Coast Guard may construct, operate, maintain, improve or expand VTS systems in any port or place under the jurisdiction of the United States, including the navigable waters of the United States, or in any area covered by an international agreement negotiated pursuant to 33 U.S.C. § 1230. The Ports and Waterways Safety Act requires certain designated vessels which operate in a VTS area to utilize and comply with the VTS. Marine accidents in recent years have underscored the need for improving safety on the nation's waterways. Moreover, Congress mandated VTS participation in section 4107 of the Oil Pollution Act , 33 U.S.C. § 1223(a)(2). The Coast Guard has amended its VTS regulations to make participation in all VTS systems mandatory.[7] A VTS system instills order and predictability on a waterway by coordinating vessel movements through the collection, verification, organization, and dissemination of information.

5. Designating Sault Ste. Marie and Berwick Bay as VTS areas will allow the Coast Guard to manage vessel traffic in those areas more efficiently and will help protect the marine environment by preventing vessel collisions and groundings. We propose, therefore, to add Sault Ste. Marie and Berwick Bay to the Commission's list of designated radio protection areas for VTS systems specified in Section 80.383. The radio protection area for Sault Ste. Marie will be defined as "The rectangle between North latitudes 45 degrees and 47 degrees, and West longitudes 83 degrees and 85 degrees." (See Figure 1.) The radio protection area for Berwick Bay will be defined as "The rectangle between

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[1] *See* Letters from E.J. Brady to George Dillon, Chief, Aviation and Marine Branch (July 6, August 4 and 5, 1994).
[2] *Report and Order*, Docket No. 20444, 56 FCC 2d 1089 (1975).
[3] *See* 47 C.F.R. § 80.373(f) n.3.
[4] Ports and Waterways Safety Act of 1972, Pub. L. No. 92-340, 86 Stat. 424, 33 USC § 1221.
[5] Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, 92 Stat. 1471, 33 USC § 1221.
[6] Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484, 33 USC § 2701.
[7] *See* 59 Fed. Reg. 36316, (1994)

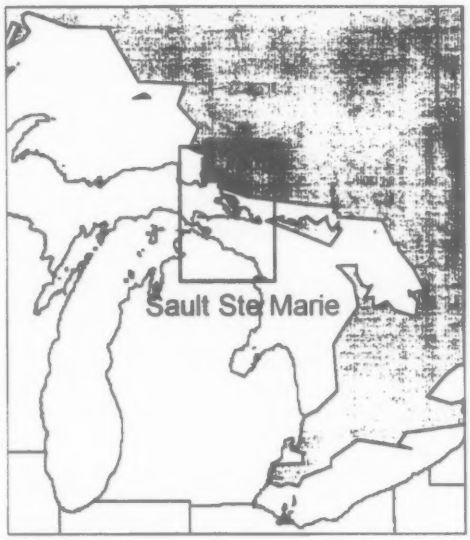

Figure 1

Figure 2

North latitudes 28 degrees 30 minutes and 30 degrees 30 minutes, and West longitudes 90 degrees 50 minutes and 92 degrees." (See Figure 2.) This area is part of the New Orleans VTS which discontinued operations on July 30, 1988, due to budgetary constraints.[8]

6. Additionally, we propose to permit private coast stations currently authorized on Channel 12 within the proposed Sault Ste. Marie VTS area to operate until the end of their current license term on a noninterference basis.[9] The Commission staff will help affected licensees find suitable alternative channels. No fee will be charged for affected stations that apply for modification for an alternative channel before their next renewals. Private coast licenses for stations in the Berwick Bay area that are within the discontinued New Orleans VTS were granted only on a provisional basis, contingent on the possibility of reestablishment of the New Orleans VTS.

7. Also we propose to designate Channel 12 (156.600 MHz) as a second radio frequency for use within the San Francisco VTS radio protection area. The density of vessel traffic in the San Francisco Bay, which includes numerous recreational boats, ferries and commercial fishing boats, severely constrains the ability of large vessels to maneuver in the event of an emergency. The Coast Guard states that with mandatory participation, the current VTS channel, Channel 14 (156.700 MHz), will be inadequate to ensure safe and reliable communications in this busy and environmentally sensitive area. The addition of Channel 12 will permit increased navigational safety in the area by organizing traffic flow patterns, reduced meeting, crossing and overtaking situations between large vessels in tight spaces, and limited vessel speed. We propose to permit private coast stations currently authorized on Channel 12 within the proposed San Francisco VTS area to operate until the end of their current license term on a noninterference basis.[10] The staff will help affected licensees find suitable alternative channels. No fee will be charged for affected stations that apply for modification for an alternative channel before their next renewal.

8. Finally, we propose to amend Section 0.331 to authorize the Chief, Wireless Telecommunications Bureau to amend the maritime service rules at the request of the United States Coast Guard to designate radio protection areas for mandatory VTS and establish marine channels as VTS frequencies for these areas. This will allow the Commission to expedite these requests, which will increase safe vessel transit and protect U.S. waters and associated natural resources from environmental harm.

[8] 4 FCC Rcd 1590 (1989)

[9] There currently are seven licensed private coast stations within the proposed designated radio protected area that would be affected by this proposal.

[10] There currently are six licensed private coast stations within the proposed designated radio protected area that would be affected by this proposal.

IV. CONCLUSION

Regulatory Flexibility Act

9. We certify that Section 605(b) of the Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601-612 (1980) does not apply to this rule making proceeding because, if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities as defined by Section 601(3) of the Regulatory Flexibility Act. Affected licensees will be assisted in arranging alternative channels for their use. The proposed rule would promote vessel safety by adding Sault Ste. Marie and Berwick Bay to the list of designated radio protection areas for VTS systems contained in the Commission's Rules, and add Channel 12 as a second radio frequency for use within the San Francisco VTS radio protection area. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy for the Small Business Administration in accordance with paragraph 605(b) of the Regulatory Flexibility Act, 5 U.S.C. § 605(b).

Ex Parte Rules - Non-Restricted Proceeding

10. This is a non-restricted notice and comment rule making proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Comment Dates

11. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **October 23, 1995**, and reply comments on or before **November 7, 1995**. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

Ordering Clause

12. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

Contact Person

13. For further information concerning this proceeding, contact James Shaffer, Wireless Telecommunications Bureau, (202) 418-0680.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

ATTACHMENT

APPENDIX

Title 47 of the Code of Federal Regulations, Parts 0 and 80, are proposed to be amended as follows:

Part 0 -- Commission organization

1. The authority citation for Part 0 continues to read as follows:

AUTHORITY: Secs. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. Section 0.331 is amended by adding new paragraph (c)(4) to read as follows:

§ 0.331 Authority delegated.

* * * * *

(4) Act on requests by the United States Coast Guard to designate radio protection areas for mandatory Vessel Traffic Services (VTS) and establish marine channels as VTS frequencies for these areas.

Part 80 -- Stations in the Maritime Services

3. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

4. Section 80.383 is amended by revising the table in paragraph (a) to add Berwick Bay and Sault Ste. Marie to the list of geographic areas for the carrier frequency 156.550 MHz and 156.600 respectively; amending paragraph (b) by adding new paragraphs (b)(7) and (b)(8) to read as follows:

§ 80.383 Vessel Traffic Services (VTS) system frequencies.

* * * * *

(a) Assigned frequencies:

VESSEL TRAFFIC CONTROL FREQUENCIES

Carrier frequencies (MHz)	Geographic areas

* * * * *

156.550	New York, New Orleans,[1] Houston, Prince William Sound,[3] Berwick Bay.
156.600	New York, New Orleans,[1] Houston, San Francisco,[3] Sault Ste. Marie.[3]

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[1] Until further notice, this frequency is available for use as permitted by § 80.373(f), notwithstanding the provisions of footnote 3 that are applicable to the VTS system. Availability is a result of the closure of the VTS system for the port area of New Orleans. If the United States Coast Guard re-establishes this system, the Commission may require operations pursuant to such conditional licenses for this frequency to cease, or may choose not to renew such conditional licenses. All licenses for this frequency will be expressly conditional upon the continued availability of the frequency for non-VTS use.

[2] Private coast station licenses for the use of this frequency will not be renewed beyond November 1, 1997. Continued use until expiration must be on a noninterference basis to Coast Guard VTS communications.

[3] Private coast station licenses for the use of this frequency in this area will expire at the end of the current license term or five years after the adopted date of the final rule, whichever comes first. Continued use until expiration must be on a noninterference basis to Coast Guard VTS communications.

(b)***

(7) *Sault Ste. Marie* . The rectangle between North latitudes 45 degrees and 47 degrees, and West longitudes 83 degrees and 85 degrees.

(8) *Berwick Bay* . The rectangle between North latitudes 28 degrees 30 minutes and 30 degrees 30 minutes, and West longitudes 90 degrees 50 minutes and 92 degrees

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 11, 1995

Comment Date: September 1, 1995
Reply Comment Date: September 18, 1995

COMMENTS INVITED ON DEPRECIATION RATE PRESCRIPTIONS PROPOSED FOR DOMESTIC TELEPHONE CARRIERS.

The Common Carrier Bureau invites comments on proposed depreciation rates and amortizations for 13 local exchange carriers (LECs) and Alascom. The proposed rates for these carriers were developed in conjunction with the Commission's standard review procedures.

Each of the 14 carriers submitted studies to the Commission in support of its proposed depreciation rates. The carriers' submissions were reviewed by the staffs of the state public utility commissions and the Common Carrier Bureau. The carriers' studies and the corresponding staff reviews were discussed in correspondence, telephone conversations, and/or conferences. Each of the carriers thereafter formally filed updated studies which contained the data required by Section 43.43 of the Commission's rules. The rates filed by the carriers are consistent with those proposed by the Bureau staff for all carriers.

The Attachment lists the 14 carriers and the affected jurisdictions. This Attachment also lists the proposed expenses and composite rates for the carriers, the current expenses and composite rates (developed using the currently prescribed depreciation rates and amortizations), and the percentage change in expenses (proposed vs. current).

The Bureau staff is recommending the life, salvage, and curve shape parameters which underlie the expenses and composite rates shown on the Attachment. These expenses are estimated annual amounts and may not reflect actual expenses because January 1, 1995 plant balances are used and the proposed rates may not be applicable for the entire year.

Copies of the carriers' initial 1995 depreciation rate study submissions, the Bureau staff's preliminary reports on these submissions, the rate filings and other data supporting the proposed rates are available for public inspection in Suite 257, 2000 L Street, N.W., Washington, D.C. Copying facilities are available in Suite 812, 2000 L Street, N.W. Copies are also available from the International Transcription Service, Inc., Room 246, 1919 M Street, N.W., Washington, D.C.

Parties wishing to file comments on the proposals summarized herein may do so by **September 1, 1995**. Replies may be filed by **September 18, 1995**. Comments and reply comments should include in the caption a reference to file no. AAD 95-122. A copy of the comments and replies should be provided to the Chief, Depreciation Rates Branch.

We will treat this proceeding as non-restricted for purposes of the *ex parte* rules. *See generally* 47 C.F.R. § 1.1200-1.1216.

For additional information contact Ms. Fatina Franklin, Chief, Depreciation Rates Branch, 202-418-0840.

FEDERAL COMMUNICATIONS COMMISSION

Attachment

ATTACHMENT

SUMMARY OF PROPOSED CHANGES IN ANNUAL DEPRECIATION EXPENSE BY JURISDICTION

Carrier - Jurisdiction	Investment	Annual Depreciation Expense and Composite Rate					
		Current		Proposed		Proposed Change	
		Expense	Percent	Expense	Percent	Expense	Percent
	($000)	($000)	(%)	($000)	(%)	($000)	(%)
ALASCOM, INC.	456,198	31,395	6.9	23,905	5.2	(7,490)	-23.9
AMERITECH-INDIANA	2,954,682	194,991	6.6	198,201	6.7	3,210	1.6
AMERITECH-MICHIGAN	7,441,010	473,972	6.4	515,433	6.9	41,461	8.7
AMERITECH-WISCONSIN	2,658,934	174,397	6.6	178,288	6.7	3,891	2.2
BELL ATLANTIC-DC, INC.	1,259,621	103,722	8.2	112,797	9.0	9,075	8.7
BELL ATLANTIC-MARYLAND, INC.	4,970,686	347,340	7.0	388,790	7.8	41,450	11.9
BELL ATLANTIC-PENNSYLVANIA, INC.	8,723,409	661,761	7.6	661,873	7.6	112	0.0
BELLSOUTH TELECOMMUNICATIONS, INC.							
Florida	9,868,725	695,417	7.0	697,626	7.1	2,209	0.3
Georgia	7,127,505	533,131	7.5	508,864	7.1	(24,267)	-4.6
North Carolina	3,988,568	306,019	7.7	323,352	8.1	17,333	5.7
South Carolina	2,538,608	182,277	7.2	187,793	7.4	5,516	3.0
GTE-FLORIDA	3,601,635	281,904	7.8	295,354	8.2	13,450	4.8
GTE-HAWAII TELEPHONE COMPANY	1,712,730	106,519	6.2	123,052	7.2	16,533	15.5
NEW YORK TELEPHONE COMPANY	18,523,603	1,466,007	7.9	1,344,429	7.3	(121,578)	-8.3
SOUTHWESTERN BELL TELEPHONE COMPANY							
Arkansas	1,739,413	109,178	6.3	128,693	7.4	19,515	17.9
Kansas	2,055,406	130,815	6.4	133,783	6.5	2,968	2.3
Missouri	4,575,454	290,986	6.4	307,188	6.7	16,202	5.6
Oklahoma	2,675,882	154,840	5.8	160,483	6.0	5,643	3.6
Texas	15,304,397	934,534	6.1	959,945	6.3	25,411	2.7
UNITED TELEPHONE-SOUTHEAST, INC.							
Tennessee	369,668	22,785	6.2	24,000	6.5	1,215	5.3
Virginia	170,107	10,640	6.3	11,297	6.6	657	6.2
West Virginia	229	14	6.1	13	5.7	(1)	-7.1
U S WEST COMMUNICATIONS, INC.							
Iowa	1,714,527	108,968	6.4	124,129	7.2	15,161	13.9
Minnesota	3,386,287	232,609	6.9	252,468	7.5	19,859	8.5
Nebraska	1,425,053	123,203	8.6	132,222	9.3	9,019	7.3
North Dakota	590,793	39,895	6.8	38,215	6.5	(1,680)	-4.2
South Dakota	651,995	43,099	6.6	42,941	6.6	(158)	-0.4
TOTAL	110,485,125	7,760,418	7.0	7,875,134	7.1	114,716	1.5

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 18, 1995

Comment Date: September 8, 1995
Reply Comment Date: September 22, 1995

ANNUAL UPDATES

COMMENTS INVITED ON DEPRECIATION RATE PRESCRIPTIONS PROPOSED FOR DOMESTIC TELEPHONE CARRIERS.

The Common Carrier Bureau invites comments on proposed depreciation rates for six local exchange carriers. The proposed depreciation rates for those carriers were developed as a result of two Commission Orders in Docket No. 92-296 on Simplification of the Depreciation Prescription Process. The Second Report and Order established ranges (projection life and future net salvage) for 22 plant categories, and the Third Report and Order established ranges for an additional eight plant categories. Under those orders, price cap carriers scheduled for review in 1996 or 1997 were given the opportunity to file for changes in their depreciation rates for 1995 provided they use basic factors within the ranges the Commission adopted.

For those accounts that met the range criteria adopted by the Commission, these six carriers submitted studies proposing revised depreciation rates based upon the ranges. For the remaining accounts, the updated depreciation rates under consideration here represent updates for rates which were fully reviewed and discussed by the staffs of this Bureau and the respective state commissions and prescribed by this Commission in prior orders. Those previously prescribed rates have now been updated to reflect the accounting experience (i.e., plant additions and retirements and net salvage amounts) that occurred in 1993 and/or 1994, while the basic factors (projection lives and future net salvages) remain unchanged. The rates filed by the carriers are consistent with those proposed by the Bureau staff for all carriers except Ameritech-Illinois and Ameritech-Ohio. Ameritech filed different rates for two accounts in Illinois (Underground Cable-Metallic and Underground Cable-Nonmetallic) and one account in Ohio (Underground Cable-Metallic). The rates filed by Ameritech for these accounts are higher than those proposed by the Bureau staff.

The Attachment lists the six carriers and the affected jurisdictions. The Attachment also lists the proposed expenses and composite rates for the carriers, the current expenses and composite rates (developed using the currently prescribed depreciation rates and amortizations), and the percentage change in expenses (proposed vs. current). These expenses are estimated annual amounts and may not be applicable for the entire year.

Copies of the carriers' annual update depreciation rate study submissions and rate filings are available for public inspection in Suite 257, 2000 L Street, N.W., Washington, D.C. Copying facilities are available in Suite 812, 2000 L Street, N.W. Copies are also available from the International Transcription Service, Room 246, 1919 M Street, N.W., Washington, D.C.

Parties wishing to file comments on the proposals summarized herein may do so by **September 8, 1995**. Replies may be filed by **September 22, 1995**. Comments and reply comments should include in the caption a reference to file no. AAD # 95-123. A copy of the comments and replies should be provided to the Chief, Depreciation Rates Branch.

We will treat this proceeding as non-restricted for purposes of the *ex parte* rules. *See generally* 47 C.F.R. § 1.1200-1.1216.

For additional information contact Ms. Fatina Franklin, Chief, Depreciation Rates Branch, 202-418-0840.

FEDERAL COMMUNICATIONS COMMISSION

Attachment

ATTACHMENT

SUMMARY OF PROPOSED CHANGES IN ANNUAL DEPRECIATION EXPENSE BY JURISDICTION

Carrier-Jurisdiction	Investment ($000)	ANNUAL DEPRECIATION EXPENSE AND COMPOSITE RATE Current Expense ($000)	Current Percent (%)	Proposed Expense ($000)	Proposed Percent (%)	Change Proposed Expense ($000)	Change Percent (%)
AMERITECH-ILLINOIS	8,037,600	570,680	7.1%	591,245	7.4%	20,565	3.6%
AMERITECH-OHIO	5,405,625	356,302	6.6%	356,426	6.6%	124	0.0%
BELL ATLANTIC-DELAWARE, INC.	684,715	56,010	8.2%	70,191	10.3%	14,181	25.3%
BELL ATLANTIC-WEST VIRGINIA, INC.	1,525,176	105,317	6.9%	109,330	7.2%	4,013	3.8%
NEVADA BELL	461,942	30,038	6.5%	31,913	6.9%	1,875	6.2%
US WEST COMMUNICATIONS, INC.							
Arizona	3,730,600	280,620	7.5%	300,022	8.0%	19,402	6.9%
Colorado	4,874,294	413,900	8.5%	422,686	8.7%	8,786	2.1%
Idaho	798,820	55,850	7.0%	56,972	7.1%	1,122	2.0%
Montana	625,402	41,911	6.7%	44,944	7.2%	3,033	7.2%
Oregon	2,091,893	151,958	7.3%	162,243	7.8%	10,285	6.8%
Utah	1,732,834	139,521	8.1%	140,281	8.1%	760	0.5%
Wyoming	634,044	49,831	7.9%	43,950	6.9%	(5,881)	-11.8%
TOTAL	30,602,945	2,251,938	7.4%	2,330,203	7.6%	78,265	3.5%

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-237

PUBLIC NOTICE

Released: August 9, 1995

FCC REQUESTS NOMINATIONS FOR MEMBERSHIP ON THE NORTH AMERICAN NUMBERING COUNCIL ADVISORY COMMITTEE

1. On July 13, 1995, the Commission adopted a new model for administration of the North American Numbering Plan (NANP) by announcing the establishment of the North American Numbering Council (NANC or Council). *See Administration of the North American Numbering Plan*, CC Docket No. 92-237, Report and Order, FCC 95-283 (released July 13, 1995). The NANP is the basic numbering scheme that permits calls to be placed within the United States, Canada, Bermuda and most of the Caribbean with, at most, 11 digit dialing. The model is guided by several principles, including maintaining and fostering an integrated approach to number administration throughout North America and providing a structure for number administration that is impartial and pro-competitive. The NANC will be organized under the provisions of the Federal Advisory Committee Act, 5 U.S.C., App. 2 (1988) (FACA), and will advise the Commission on numbering issues, select and guide a neutral NANP Administrator, apply Commission policy to resolve issues arising in the administration of the NANP, and conduct initial dispute resolution of all issues. The NANP Administrator will process number resource applications and maintain administrative numbering databases. Operational details and additional activities of the NANP Administrator are to be determined by the NANC. The Commission, with other NANP member countries, will oversee the NANC. Because the Council will include representatives from every sector of the telecommunications industry, as well as members representing NANP member countries, the states, and consumers, the Council's membership will be impartial and well balanced.

2. In carrying out its responsibilities, the Council shall assure that NANP administration supports the following policy objectives: (1) that the NANP facilitates entry into the communications marketplace by making numbering resources available on an efficient, timely basis to communications service providers; (2) that the NANP does not unduly favor or disfavor any particular industry segment or group of consumers; (3) that the NANP gives due regard to state and local interests; (4) that the NANP does not unduly favor one technology over another; (5) that the NANP gives consumers easy access to the public switched telephone network; and (6) that the NANP ensure that the interests of all NANP member countries are addressed fairly and efficiently, fostering continued integration of the NANP across NANP member countries.

I. FORMATION OF THE ADVISORY COMMITTEE

A. Procedure for Establishing an Advisory Committee

3. A Federal Advisory Committee may be established only after consultation with the Office of Management and Budget (OMB) and the General Services Administration (GSA) and the filing of a charter with Congress. The Commission will prepare a charter and initiate the requisite consultation process prior to formation of the Council.

B. Participants

4. Each interested party will have the opportunity to be adequately represented. Further, the Commission must be satisfied that the group, as a whole, reflects a proper balance and mix of interests.

5. Entities may apply for, or nominate another entity for, membership on the Council. Each application or nomination must include:

(a) the name and title of the applicant or nominee and a description of the interests the applicant or nominee will represent;

(b) the applicant's or nominee's mail address, e-mail address (where available), telephone number and facsimile number;

(c) evidence that the applicant or nominee is authorized to represent parties related to the interests the applicant or nominee proposes to represent;

(d) the reasons why the applicant or nominee is an interested party; and

(e) a written commitment that the applicant or nominee shall actively participate in good faith in the objectives of the Council.

C. Agenda

6. If the Council's charter is approved, the Council's first meeting should take place within 30 days after such approval. At this initial meeting, the Council will begin the selection process for a neutral NANP Administrator; such selection shall occur no later than 180 days from the initial meeting of the Council.

D. Meetings and Compensation

7. The Federal Communications Commission will provide facilities needed to conduct the meetings, if the Commission has meeting facilities available. Otherwise, private sector members will provide facilities. Private sector members of the Council will serve without any government compensation, and will not be entitled to travel expenses or per diem subsistence allowances. Private sector members will not be considered special government employees for any purpose.

E. Record of Meetings

8. Pursuant to FACA, at all Council meetings, the Council will keep a record of meeting minutes and a Designated Federal Official will be present. This record will be placed

in CC Docket No. 92-237. The Commission will announce Council meetings in the Federal Register. These meetings will be open to the public.

II. CONCLUSION

9. Interested parties may file applications or nominations for Council membership on or before thirty days from publication of this notice in the Federal Register. Applications and nominations should be sent to the Office of the Secretary, CC Docket No. 92-237, Federal Communications Commission, Washington, D.C. 20554. Applications and nominations will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 1919 M Street, N.W., Room 239, Washington, D.C. 20554.

10. For further information pertaining to membership on the Council contact Mike Specht (202) 418-2378, Scott Shefferman (202) 418-2332, or Elizabeth Nightingale (202) 418-2352, Common Carrier Bureau, 2025 M Street, N.W., Room 6008, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition of the Ameritech Operating Companies for Waiver of Part 69 of the Commission's Rules to Establish New 900 Access Service Rate Element

ORDER

Adopted: August 9, 1995; Released: August 9, 1995

By the Chief, Tariff Division, Common Carrier Bureau:

1. On March 31, 1995, the Ameritech Operating Companies (Ameritech)[1] filed a petition for waiver of Section 69.106 of the Commission's Rules, 47 C.F.R. § 69.106, and any other relevant portions of Part 69, to establish a new nonrecurring rate element for recovery of the costs of switch translation changes necessary to allow access customers to activate a 0+ option at the time 900 access service is ordered. On April, 19, 1995, the Commission solicited comments on the Ameritech petition;[2] none were received.

2. Ameritech states that its switched access tariff currently includes non-recurring rate elements to recover the costs of activating 900 "NXX" codes. It states that its tariff also includes a rate element permitting customers to activate a 0+ 900 service option subsequent to the initial request for 900 access service in a Local Access Transport Area (LATA).[3] Ameritech now seeks to offer customers the option of ordering 0+ 900 service access when they initially request 900 access service in a LATA.[4]

3. To effectuate this option, Ameritech filed a petition for waiver of Part 69 of the Commission's rules. Ameritech contends that its waiver request meets the Commission's "good cause" standard established in Section 1.3 of the Commission's rules.[5] It observes that since the proposed rate element is a new offering which allows customers a new option in ordering 900 service, a rate element associated with this service offering was not provided for in the rules. Ameritech further maintains that with the addition of this new rate element, the structure for 900 access service will be identical to the current rate structure for its 500 access service. Consequently, states Ameritech, the waiver does not undermine the Commission's current rate structure.[6] Finally, Ameritech contends that granting the waiver request serves the public interest by giving customers both the option of ordering 0+ access concurrent with their initial order for 900 access service and the efficiencies associated with concurrent service requests.[7]

4. The Commission may exercise its discretion to waive a rule when there is "good cause" to do so, if the particular facts would make strict compliance inconsistent with the public interest.[8] Further, the Commission's grant of a waiver must be based on articulated, reasonable standards that are predictable, workable, and not susceptible to discriminatory application.[9] The Bureau has granted a number of similar requests for waivers of Part 69 of the Commission's rules.[10] In so doing, the Bureaup determined that the public interest would be served by permitting an exchange carrier to use a separate rate element to recover the costs of providing 900 access service. We have determined that this same finding applies to the waiver sought by Ameritech. We thus conclude that Ameritech has adequately justified the establishment of a new rate element to recover the costs of activating a 0+ option when customers initially request 900 access service.

5. Accordingly, IT IS ORDERED that the petition for waiver filed by the Ameritech Operating Companies IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Chief, Tariff Division,
Common Carrier Bureau

[1] The Ameritech Operating Companies are: Illinois Bell Telephone Company, Indiana Bell Telephone Co., Inc., Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc.

[2] Ameritech Files Petition for Waiver of Part 69 of the Commission's Rules, Public Notice, 10 FCC Rcd 6636 (Com. Car. Bur. 1995).

[3] Ameritech was granted a waiver of Part 69 in 1987 to establish its 900 access service. *See* Ameritech Operating Companies, Transmittal No. 87, Order, 2 FCC Rcd 4217 (Com. Car. Bur. 1987).

[4] Ameritech Petition at 2.

[5] 47 C.F.R. § 1.3.

[6] Ameritech Petition at 3.

[7] *Id.*

[8] WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

[9] Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[10] *See, e.g.*, New York Telephone Co., Transmittal No. 884, Order, 3 FCC Rcd 2993 (Com. Car. Bur. 1988); United Telecommunications, Inc., Memorandum Opinion and Order, 4 FCC Rcd 1530 (Com. Car. Bur. 1988); Lincoln Telephone and Telegraph Co., Memorandum Opinion and Order, 4 FCC Rcd 5024 (Com. Car. Bur. 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 10, 1995

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELLSOUTH TELECOMMUNICATIONS, INC.'S PETITION FOR LIMITED WAIVER OF NETWORK DISCLOSURE RULES

CCBPol 95-6

On August 4, 1995, BellSouth filed a petition seeking an expedited waiver of the time requirements of the Commission's network disclosure rules in order to provide optical capabilities to existing asynchronous LightGate® customers.

BellSouth filed the petition contemporaneously with a tariff transmittal which proposes to provide synchronous LightGate service, a new offering including systems with optical capabilities. BellSouth indicates that it has made network disclosure of this service consistent with the Commission's rules.

In the same tariff filing, which is scheduled to take effect on September 18, 1995, BellSouth proposes a transitional offering of optical capabilities to existing asynchronous LightGate customers who elect to upgrade to synchronous service and equipment. BellSouth seeks a waiver of the network disclosure requirements for this transitional service for which it has not made network disclosure. BellSouth indicates that it will make network disclosure by September 15, 1995. BellSouth states that under current rules, it would have to wait a minimum of six months between notifying the public of this new service and introducing it.

BellSouth asserts that a waiver allowing it to provide interim asynchronous optical capabilities as soon as practicable would benefit customers who have already invested in asynchronous technology but are not yet ready to convert to synchronous service and equipment. BellSouth argues that the waiver would not disadvantage equipment providers since the provision of interim asynchronous optical capabilities would not require the design, manufacturing, or purchase of any new equipment. BellSouth asks that the Commission grant the waiver in time for existing demand to take advantage of the service upon the effective date of BellSouth's tariff filing.

Interested parties should file comments on BellSouth's petition by **August 24, 1995**, and reply comments by **August 31, 1995** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Janice Myles, Common Carrier Bureau, FCC, Room 544, 1919 M Street N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc. 2100 M Street, N.W. Suite 140, Washington, D.C. 20037. Parties filing comments in this non-docketed proceeding should include the Policy Division internal reference number, CCBPol 95-6, on their pleadings. BellSouth's petition is available for inspection and copying in the Industry Analysis Division reference room, Common Carrier Bureau, Room 533, 1919 M Street, N.W., Washington, D.C. 20554. Copies can also be obtained from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Janice Myles, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1577.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 11, 1995

FREEZE ON THE FILING OF HIGH POWER APPLICATIONS FOR 12.5 kHz OFFSET CHANNELS IN THE 450-470 MHz BAND (PR Docket 92-235, FCC 95-255)

On June 15, 1995, the Commission adopted a *Report and Order*, PR Docket No. 92-235, FCC 95-255, to promote more efficient use of the private land mobile radio (PLMR) spectrum below 800 MHz. The Commission formulated a narrowband channel plan in order to promote spectrum efficiency. Under the new plan, channels in the 450-470 MHz band available under former Section 90.267 of the Commission's rules, 47 C.F.R. § 90.267, that are 12.5 kHz removed from regularly-assignable channels and reserved for low power operation ("12.5 kHz offset channels") can be assigned for high power operation. The Commission recognized, however, that there still is a need for low power channels. It stated that frequency coordinators, as part of the coordination transition plan, could designate specific channels for low power use. A key part of the frequency coordination plan is the consolidation of the twenty PLMR services. The Commission provided the PLMR community three months to negotiate and submit a consensus plan for consolidation.

Hewlett-Packard Company (HP) submitted a letter on July 25, 1995, to the Chief of the Private Wireless Division, requesting that, in light of the August 18, 1995, effective date of the new rules, the Commission protect current operations on these 12.5 kHz offset channels until the underlying issues regarding frequency coordination and the establishment of dedicated channels in the 450-470 MHz band for low power use are addressed. HP stated that hospitals use tens of thousands of HP telemetry devices operating on the 12.5 kHz offsets to monitor electrocardiographs and other critical information on the status of cardiac patients. HP explained that these telemetry units play an important role in allowing cardiac patients to become ambulatory within limited proximity to the treating hospital, thereby facilitating recovery and reducing inpatient costs. HP suggested that medical telemetry and high-powered operations cannot co-exist on these 12.5 kHz offset channels.

The Bureau agrees with HP that a problem could develop if many applicants were to file for and obtain high powered operation on these offsets prior to coordinators identifying a new location for low power operations. Therefore, license applications requesting power in excess of that now permitted on the offsets (*e.g.*, 2 watts output power in all services except the Special Industrial Radio Service, where entities may be licensed for an effective radiated power of up to 100 watts) will not be accepted for filing until issues are resolved relative to the consolidation of radio services and/or the designation of dedicated channels in the 450-470 MHz band for low power use. Upon the resolution of these issues, the Commission will notify the public as to the lifting of the freeze.

The imposition of the freeze is procedural in nature and, therefore, is not subject to the notice and comment and effective date requirements of the Administrative Procedure Act (APA) (5 U.S.C. § 553(b)(3)(B)). See *Neighborhood TV Co., Inc. v. FCC*, 742 F.2d 629 (D.C. Cir. 1984), *Buckeye Cablevision, Inc. v. United States*, 438 F.2d 948 (6th Cir. 1971), and *Kessler v. FCC*, 326 F. 2d 673 (D.C. Cir. 1963). Furthermore, good cause exists for non-compliance with the APA's "notice and comment" and "effective date" requirements because it would be impractical, unnecessary, and contrary to the public interest if the Commission did not act to protect the critical operations on these 12.5 kHz offset channels. This action is effective immediately.

By the Chief, Wireless Telecommunications Bureau.

Wireless Telecommunications Bureau contact: Mark Rubin at 202-418-0680.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications, Inc.,
Pacific Telecom, Inc. and Telephone
Utilities of Eastern Oregon, Inc.

Joint Petition for
Waiver of Section 61.41(c)(2) AAD 94-69
and the Definition of "Study Area"
Contained in the Part 36 Appendix-Glossary
of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: August 10, 1995; Released: August 11, 1995

By the Chief, Accounting and Audits Division:

I. INTRODUCTION

1. On June 9, 1994, US West Communications, Inc. ("US West"), Pacific Telecom, Inc. ("PTI") and Telephone Utilities of Eastern Oregon, Inc. ("Eastern Oregon") (collectively, "Petitioners") filed a joint petition for waiver ("Joint Petition") of two commission rules. US West and PTI both seek a waiver of the definition of "Study Area" contained in the Part 36 Appendix-Glossary of the Commission's rules. That definition constitutes a rule freezing all study area boundaries. The requested waivers would allow US West and PTI to alter the boundaries of their Oregon study areas when transferring 23 telephone exchanges from US West to PTI. In addition, PTI and its wholly owned subsidiary, Eastern Oregon, seek waivers of the price cap rule contained in Section 61.41(c)(2) of the Commission's rules.[1] That rule requires non-price cap companies--and the telephone companies with which they are affiliated--to become subject to price cap regulation after acquiring a price cap company or any part thereof. The requested waiver would permit Eastern Oregon and the other affiliates of PTI to remain under rate-of-return regulation after Eastern Oregon acquires the 23 exchanges which currently are under price cap regulation.

2. On July 12, 1994, the Common Carrier Bureau ("Bureau") released a public notice soliciting comments on the Joint Petition.[2] The Bureau received comments supporting the Joint Petition from two parties: the National Exchange Carrier Association, Inc. ("NECA") and the United States Telephone Association ("USTA"). At the request of Bureau staff, Petitioners provided additional financial and cost data concerning the Joint Petition.[3] In this Order, we find that the public interest would be served by allowing PTI and US West to alter their study area boundaries and allowing PTI and Eastern Oregon to continue operating under rate-of-return regulation after acquiring the 23 exchanges. We therefore grant the Joint Petition, as conditioned and explained more fully below.

II. STUDY AREA WAIVERS

3. *Background.* A study area is a geographical segment of a carrier's telephone operations. Generally, a study area corresponds to a carrier's entire service territory within a state. Thus, carriers operating in more than one state typically have one study area for each state, and carriers operating in a single state typically have a single study area. Study area boundaries are important primarily because carriers perform jurisdictional separations at the study area level.[4] For jurisdictional separations purposes, the Commission froze all study area boundaries effective November 15, 1984.[5] The Commission took that action primarily to ensure that local exchange carriers ("LECs") do not set up high-cost exchanges within their existing service territories as separate study areas to maximize high-cost payments.[6] The study area freeze also prevents LECs from transferring exchanges among existing study areas for the purpose of increasing interstate revenue requirements and compensation. A LEC must apply to the Commission for a waiver of the frozen study area rule if the LEC wishes to sell an exchange to another carrier and if that transaction would have the effect of changing the study area boundaries of either carrier.[7]

4. Waiver of Commission rules is appropriate only if special circumstances warrant deviation from the general

[1] PTI owns two operating telephone companies in Oregon: Telephone Utilities of Oregon, Inc. and Telephone Utilities of Eastern Oregon, Inc. Both companies operate under the name PTI Communications, Inc. and share a single study area.

[2] Public Notice, 9 FCC Rcd 3302 (Com. Car. Bur. 1994).

[3] Letter from Lawrence Sarjeant, US West, to Kathleen Wallman, Chief, Common Carrier Bureau, FCC, dated Jan. 24, 1995 ("US West Jan. 24 Letter"); letter from Brian D. Thomas, Pacific Telecom, Inc., to Adrian Wright, Accounting & Audits Div., FCC, dated May 2, 1995 ("PTI May 2 Letter"); letter from Michael Crumling, US West, to William Caton, Acting Secretary, FCC, dated June 12, 1995 ("US West June 12 Letter"); letter from Teresa Baer, Latham & Watkins, to Charles Needy, Accounting & Audits Div., FCC, dated Aug. 3, 1995 ("PTI Aug. 3 Letter").

[4] The phrase "jurisdictional separations," or "separations," refers to the process of dividing costs and revenues between a carrier's state and interstate operations. See generally 47 C.F.R. §§ 36.1-36.741.

[5] 47 C.F.R., Part 36, Appendix-Glossary, definition of "Study Area" (1993). See MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (Dec. 12, 1984) (*1984 Joint Board Recommended Decision*), adopted by the Commission, 50 Fed. Reg. 939 (Jan. 8, 1985) (*1985 Order Adopting Recommendation*). See also Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (1990) (*Study Area Notice*).

[6] *See 1985 Order Adopting Recommendation*, 50 Fed. Reg. 939, 940. Also see 1984 Joint Board Recommended Decision, 49 Fed. Reg. 48325, 48337.

[7] 47 C.F.R. Part 36, Appendix-Glossary. See also 47 C.F.R. § 1.3.

rule[8] and such a deviation will serve the public interest.[9] In evaluating petitions seeking a waiver of the rule freezing study area boundaries, the Commission employs a three-prong standard:[10] first, that the change in study area boundaries does not adversely affect the Universal Service Fund ("USF") support program;[11] second, that the state commission(s) having regulatory authority over the exchange(s) to be transferred does not object to the change; and third, that the public interest supports such a change. In evaluating whether the change would adversely affect the USF, the Commission applies a "one percent" guideline to study area waiver requests filed after January 5, 1995.[12] This guideline does not apply in the instant case because Petitioners filed before that date.

5. *Petition.* According to Petitioners, US West seeks a waiver of the rule freezing study area boundaries to enable it to remove 23 exchanges, which serve approximately 16,000 access lines, from its Oregon study area, which serves approximately 1,120,890 access lines. PTI seeks a similar waiver to enable it to add these 23 exchanges to its existing Oregon study area, which currently consists of 23 exchanges serving approximately 46,427 access lines. Petitioners further state that all of the transferred exchanges would be operated by Eastern Oregon, a wholly owned subsidiary of PTI.[13]

6. Petitioners assert that these requests are consistent with the original purpose of the USF and that the resulting impact on the USF would be marginal. Petitioners state that US West's Oregon study area currently receives no USF assistance and would receive no such assistance after the transfer.[14] PTI estimates that, if the study area waivers were granted, the transfer of the 23 exchanges would result in an increase of $5,943,894 (or approximately 107 percent) in the USF draw of PTI's Oregon study area. Such an increase would raise that study area's USF draw from its current level of $5,574,865 to $11,518,884.[15] Petitioners further assert that the proposed change would serve the public interest because Eastern Oregon would improve customer service in the newly acquired exchanges by constructing new digital central offices that would provide the latest signalling technology.[16] PTI estimates that these upgrades would require an investment outlay of approximately $24,000,000 over a five-year period.[17]

7. *Discussion.* Petitioners' proposals demonstrate that current and potential customers in the affected exchanges will likely be better served by Eastern Oregon than US West. Petitioners state that Eastern Oregon would install state-of-the-art technology that would enable it to provide single-line service to customers now served by party lines and provide enhanced digital services to all customers.[18] We thus believe the transfer of these exchanges, which has been approved by the Public Utility Commission of Oregon ("Oregon PUC"),[19] likely will serve the public interest. In addition, we have determined that the increase of $5,943,894 in the USF draw of Eastern Oregon would not have a significant adverse effect on the USF. We therefore find that the three existing criteria for granting a study area waiver have been met in this instance and that the waiver requests should be granted.

8. Although we find no reason to question Eastern Oregon's estimates of the USF impact, we nonetheless are concerned that those estimates may later prove inaccurate when the planned upgrades are completed. We have found that, even in a period of a few years, the USF payments for some LECs have risen by unexpected amounts. These LECs generally had undertaken substantial upgrades or expansions of the local network in difficult-to-serve, sparsely populated exchanges that are similar to the exchanges be-

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[8] Northeast Cellular Telephone Company v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[9] WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

[10] See US West Communications, Inc., and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, Memorandum Opinion and Order, 10 FCC Rcd 1771 (1995) (*US West-Eagle Study Area Order)* at ¶ 5.

[11] SF PROCEDURE SF RULE *See 1984 Joint Board Recommended Decision*, 49 Fed. Reg. at 48337, ¶ 66. The Commission created the USF to preserve and promote universal service. See Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 96 FCC 2d 781 (1984). The USF allows LECs with high local loop plant costs to allocate a portion of those costs to the interstate jurisdiction, thus enabling the states to establish lower local exchange rates in study areas receiving such assistance. To determine which LEC study areas are eligible for USF support, the USF rules prescribe an eligibility threshold set at 115 percent of the national average unseparated loop cost per working loop. When loop cost in a particular study area exceeds that threshold, the study area is eligible for support equal to a certain percentage of the loop cost in excess of that threshold. The study area becomes eligible for higher levels of support as its loop cost rises above additional thresholds set farther above the national average unseparated loop cost. Because USF assistance is targeted primarily at small study areas, the level of support provided at each threshold generally is greater if the study area has 200,000 or fewer working loops. *See* 47 C.F.R. § 36.631.

[12] ULES The Commission stated that no waiver of the rule freezing study area boundaries should result in an annual aggregate shift in USF assistance in an amount equal to or greater than one percent of the total USF, unless the parties can demonstrate extraordinary public interest benefit. The USF effect for the year must be computed on an annualized basis. To prevent carriers from evading this limitation by disaggregating a single large sale of exchanges into a series of smaller transactions that in the aggregate have the same effect on the USF, the Commission further requires that the "one percent" guideline be applied to all study area waivers granted to either carrier, as a purchaser or seller, pending completion of the current review of the USF program. In this context, the Commission defines the term "carrier" to include all affiliated carriers *(i.e.,* those carriers that are in common control, as the term "control" is defined in Section 32.9000 of the Commission's rules, 47 C.F.R. § 32.9000). See US West-Eagle Study Area Order at ¶ ¶ 14-17.

[13] Joint Petition at 1, 5. We obtained the number of access lines for the Oregon study areas of PTI and US West from the National Exchange Carrier Association's Annual USF Report submitted to the Commission in September 1994.

[14] Joint Petition at 5-7.

[15] PTI May 2 Letter.

[16] Joint Petition at 5.

[17] PTI Aug. 3 Letter.

[18] Joint Petition at 5.

[19] The Oregon PUC approved the proposed exchange transfer if PTI and US West accept certain conditions. *See* Public Utility Commission of Oregon Order, Order No. 95-526, Joint Application of US West Communications, Inc., and Telephone Utilities of Eastern Oregon, Inc., d/b/a PTI Communications, for an Order Authorizing the Sale and Purchase of Certain Telephone Exchanges, adopted May 31, 1995. PTI and US West state that they have agreed to those conditions. *See* US West June 12 Letter at Attachment.

ing acquired by Eastern Oregon.[20] Moreover, we are concerned that this sale and a number of similar proposed transactions might, in the aggregate, have a substantial effect on the size of the USF and on those high-cost LECs that draw from the USF.

9. This concern has been mitigated, in the short term at least, by the Commission's adoption of the JointBoard's recommendation for an indexed cap on the USF.[21] Yet, even in the short term, unidentified errors contained in Eastern Oregon's impact estimates may adversely affect the fund's distribution, if not its size. Under the indexed USF cap rules, any study area reconfiguration that increases the USF draw of one USF recipient reduces that of other USF recipients. Hence, if Eastern Oregon's estimate proves to be too low, the support provided to other USF recipients could be lowered by an amount that does have a material impact . We therefore find that the waivers should be subject to the condition that the annual USF support provided to the PTI study area shall not exceed $11,518,848, the post-transfer and post-upgrade amount estimated in the PTI May 2 Letter.[22] The limit imposed by this condition is consistent with PTI's representations as to the expected impact of the proposed changes on the annual USF payments it receives. This condition therefore will ensure that the study area waivers will not result in adverse effects on the USF program that exceed PTI's forecasts.[23]

III. PRICE CAPS WAIVER

10. *Background.* Section 61.41(c)(2) of the Commission's rules provides that, when a non-price cap company acquires a price cap company, the acquiring company--and any LEC with which it is affiliated--shall become subject to price cap regulation within a year of the transaction.[24] The Commission stated that this "all-or-nothing" rule applies not only to the acquisition of an entire LEC but also to the acquisition of part of a study area.[25] Hence, under this rule, Eastern Oregon's acquisition of US West's 23 exchanges obligates Eastern Oregon and its parent, PTI, to become subject to price cap regulation instead of rate-of-return regulation.

11. The Commission explained that the all-or-nothing rule is intended to address two concerns it has regarding mergers and acquisitions involving price cap LECs. The first concern is that, in the absence of the rule, a company might attempt to shift costs from its price cap affiliate to its non-price cap affiliate, allowing the non-price cap affiliate to earn more--due to its increased revenue requirement--without affecting the earnings of the price cap affiliate, *i.e.*, without triggering the sharing mechanism. The second concern is that, absent the rule, a LEC may attempt to "game the system" by switching back and forth between rate-of-return regulation and price cap regulation. The Commission cited, as an example, the incentive a price cap LEC may have to increase earnings by opting out of price cap regulation, building up a large rate base under rate-of-return regulation so as to raise rates and, then, after

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[20] *See, e.g.*, Delta Telephone Company, 5 FCC Rcd 7100 (1990), whose USF payment grew from $82,500 in 1991 to approximately $445,700 in 1993; and US West and Gila River Telecommunications, Inc., 7 FCC Rcd 2161 (1992), whose projection of $169,155 for Gila River's 1992 USF payment was more than doubled by the actual 1992 payment of $390,993, which has been nearly doubled again by the 1995 scheduled payment of approximately $750,000.

[21] RDER The Joint Board recommended, and the Commission adopted, interim rules that will limit the rate of growth of the USF to the rate of growth in the total number of working loops nationwide. That rate of growth has generally ranged from two percent to five percent per year. This moderate growth rate will allow the USF to continue to provide adequate support to carriers serving high-cost areas, while preventing excessive increases in the USF. See generally Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 9 FCC Rcd 334 (1993) (*"1993 Joint Board Recommended Decision"*), adopted by the Commission, 9 FCC Rcd 303 (*"Interim Cap Order"*). To determine whether permanent changes in the USF rules are necessary, the Commission subsequently initiated a proceeding to address this issue. *See* Notice of Inquiry, CC Docket No. 80-286, 9 FCC Rcd 7404 (1994); Notice of Proposed Rulemaking, CC Docket No. 80-286, FCC 95-282 (released July 13, 1995).

[22] The imposition of a limit does not imply that the USF draw for PTI's Oregon study area will necessarily increase to that level. PTI developed the $11,518,848 estimate by comparing the 1993 nationwide average loop cost to the average loop cost of its Oregon study area, assuming that both the transfer and the $24,000,000 of upgrades are already complete. Yet, because the upgrade program is estimated to require five years, the nationwide average loop cost may be substantially higher--due to upgrades by other LECs and inflation--when PTI's upgrades are actually completed. Thus, PTI's estimate is based on cost data that may overstate the amount by which its loop costs will exceed the nationwide average. Further, under the interim USF rules, a lag of up to two years exists between the time that a LEC incurs additional loop costs and the time that its study area receives additional USF assistance reflecting those higher costs. *See* 47 C.F.R. §§ 36.611-36.612. The existence of this lag time means that the current USF rules may be replaced with new rules, as discussed *supra* at note, even before the initial stage of upgrades planned by PTI would cause increased USF payments to the PTI study area. Those new permanent USF rules may alter the method used to determine the distribution of USF support to high-cost areas, thereby changing the projected level of support to the PTI study area.

[23] These study area waivers also are subject to the condition that, if the selling LEC is a price cap carrier selling a high-cost portion of its operations, it shall make a downward exogenous adjustment to its Price Cap Index to reflect the change in its study area boundaries. *See* Price Cap Performance Review for Local Exchange Carriers, First Report and Order, CC Docket No. 94-1, FCC 95-132, released April 7, 1995 (*"LEC Price Cap Review Order"*), at ¶ ¶ 328 and 330. Under that requirement, US West must reduce the Price Cap Index for its Oregon study area if the change in study area boundaries reduces the cost basis for that index. The Price Cap Index, which is the cost index on which price-capped rates are based, is calculated pursuant to a formula specified in the Commission's rules for price cap LECs. *See* 47 C.F.R. § 61.45.

[24] 47 C.F.R. § 61.41(c). See Second Report and Order, 5 FCC Rcd 6786, 6821 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), modified on recon. 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*), petitions for further recon. dismissed, 6 FCC Rcd 7482 (1991), aff'd, National Rural Telecom Assoc. v. FCC, 988 F.2d 174 (D.C. Cir. 1993), further modification on recon., 6 FCC Rcd 4524 (1991)(ONA Part 69 Order), second further recon., 7 FCC Rcd 5235 (1992).

[25] The Commission explained that, if these two types of acquisitions were not treated the same under the all-or-nothing rule, a LEC could avoid the rule by selling all but one of its exchanges. See LEC Price Cap Reconsideration Order, 6 FCC Rcd 2637, 2706.

returning to price caps, cutting costs back to an efficient level. It would disserve the public interest, the Commission stated, to allow a LEC to alternately "fatten up" under rate-of-return regulation and "slim down" under price caps regulation, because rates would not fall in the manner intended under price cap regulation.[26]

12. The Commission nonetheless recognized that a narrow waiver of the all-or-nothing rule might be justified if efficiencies created by the purchase and sale of a few exchanges were to outweigh the threat that the system may be subject to gaming.[27] Such a waiver would not be granted unconditionally, however. Rather, similar to certain study area waivers,[28] waivers of the all-or-nothing rule would be granted subject to the condition that the selling price cap LEC shall make a downward exogenous adjustment to its Price Cap Index to reflect the change in its study area. That adjustment is needed to remove the effects of the transferred exchanges from price-capped rates that have been based, in whole or in part, upon the inclusion of those exchanges in the study areas subject to price cap regulation.[29]

13. *Petition.* Eastern Oregon and PTI seek waivers of Section 61.41(c)(2) so they may operate as rate-of-return LECs, rather than price cap LECs, after acquiring the 23 exchanges which currently are under price cap regulation. Petitioners argue that the rule's application in this instance is contrary to the public interest and does not serve the purposes for which the rule was adopted. Petitioners further argue that the Commission's two concerns, the threat of cost shifting between affiliates and gaming of the system, are not at issue in this case.[30]

14. *Discussion.* We agree with Petitioners that the Commission's first concern underlying the all-or-nothing rule is not applicable in this case. Neither Eastern Oregon nor PTI has an incentive to shift costs between price cap and rate-of-return affiliates, because neither company is seeking to maintain separate affiliates under different systems of regulation. As to the Commission's second concern, we find it implausible that US West could game the system by moving the 23 exchanges back and forth between price caps and rate-of-return regulation, because US West is selling these exchanges and a reacquisition would require a second study area waiver. Moreover, US West cannot transfer the 23 exchanges without removing the rate-increasing effects of these exchanges from the price-capped rates that have been based, in part, upon the inclusion of these exchanges in its Oregon study area.[31]

15. We therefore find there is good cause to grant Eastern Oregon and PTI a waiver of the all-or-nothing rule to permit them to remain under rate-of-return regulation after acquiring the 23 exchanges which currently are under price cap regulation. As noted above, these waivers are subject to the condition that US West shall make a downward exogenous adjustment to its Price Cap Index to reflect the removal of these exchanges from its Oregon study area. For the present, we will continue to regulate Eastern Oregon and PTI as rate-of-return carriers. Because we are waiving Section 61.41(c)(2), they need not withdraw from the NECA pools. We note that, as with any other rate-of-return carriers, Eastern Oregon and PTI may elect price cap regulation in the future if they decide to withdraw from the NECA pools.

IV. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 155(c) and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, that the Joint Petition of US West Communications, Inc., Pacific Telecom, Inc. and Telephone Utilities of Eastern Oregon, Inc., d/b/a PTI Communications, for waiver of Part 36, Appendix-Glossary, of the Commission's Rules, 47 C.F.R. Part 36 Appendix-Glossary, and for waiver of Section 61.41(c)(2) of the Commission's Rules, 47 C.F.R. § 61.41(c)(2), IS GRANTED subject to the conditions set forth above.

17. IT IS FURTHER ORDERED that NECA shall not distribute USF assistance exceeding the limit imposed in paragraph 9, *supra*.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

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[26] LEC Price Cap Reconsideration Order, 6 FCC Rcd 2637, 2706.
[27] *Id.*
[28] *See supra* at note 23.
[29] *See LEC Price Cap Review Order* at ¶ 330.
[30] Joint Petition at 8.
[31] *See supra* at ¶ 12.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 95-133

In the Matter of

AT&T Contract Tariff No. 374	Transmittal Nos. CT 2952 and CT 3441

Direct Case Due: August 25, 1995
Oppositions Due: September 8, 1995
Reply Due: September 15, 1995

ORDER DESIGNATING ISSUES FOR INVESTIGATION

Adopted: August 11, 1995; Released: August 11, 1995

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order, the Common Carrier Bureau (Bureau) designates issues in an investigation of AT&T's proposed modifications to Contract Tariff No. 374[1] as contained in Transmittal Nos. 2952 and 3441 and their relationship to the contract between AT&T Corporation (AT&T) and The Furst Group (TFG) that formed the basis for Contract Tariff No. 374. The Bureau, in the May 1995 order initiating this investigation, suspended the transmittals for five months.[2]

II. BACKGROUND

A. Contract Tariff No. 374

2. On August 6, 1993, TFG and AT&T entered into a contract that sets forth the terms and conditions purportedly governing the services and rates provided pursuant to AT&T's Contract Tariff No. 374, which became effective on August 20, 1993.[3] On July 11, 1994, TFG filed a formal complaint against AT&T seeking certain relief on the grounds that AT&T allegedly had breached material terms of its agreement with TFG,[4] thereby, TFG argues, violating Section 201(b) of the Communications Act of 1934, as amended (Act).[5] On January 11, 1995, AT&T filed Transmittal No. CT 2952, which proposes to modify the contract price, volume discount, and availability sections of Contract Tariff No. 374. On January 17, 1995, TFG and Public Service Enterprises, Inc. (PSE) filed petitions to reject or suspend Transmittal No. CT 2952[6] and AT&T replied.[7] On April 26, 1995, AT&T filed Transmittal No. CT 3441 to revise the changes made in its earlier Transmittal No. CT 2952. On May 2, 1995, TFG filed a petition[8] to reject or suspend AT&T's Transmittal No. CT 3441. On May 5, 1995, AT&T filed reply comments.[9] Transmittal Nos. CT 2952 and CT 3441 were both scheduled to take effect on May 11, 1995, but were suspended by a Bureau order issued on May 10, 1995.[10]

B. Transmittal No. CT 2952

3. In its petition to reject or suspend Transmittal No. CT 2952, TFG claims that AT&T failed to obtain its prior consent to modify Contract Tariff No. 374's terms and conditions as proposed in Transmittal No. CT 2952. TFG complains that the transmittal would adversely affect it by, among other things, increasing the volume thresholds required for discounts on international calls.[11] TFG also alleges that the revisions in the transmittal would alter Contract Tariff No. 374 so that it would be inconsistent with material terms of the contract between TFG and AT&T.[12] Alleged differences between contract requirements and AT&T's performance under the contract are also issues

[1] This contract tariff applies to AT&T Software Defined Network (SDN) Services and AT&T 800 Services consisting of: AT&T MEGACOM 800, Service-Domestic and AT&T 800 READYLINE-Domestic (READYLINE) for interstate or foreign communications.

[2] AT&T Communications Contract Tariff No. 374, Order, DA 95-1061 (Com. Car. Bur. May 10, 1995) (*Suspension Order*).

[3] A "contract tariff" is initiated by a contract between a carrier and an initial customer. The underlying contract is generally considered proprietary between the two parties, but the carrier is required to file a contract tariff with the Commission that contains a description of the material terms and conditions of the offering. Carriers make the contract tariff generally available to similarly situated customers for a period of no less than 90 days. *See* Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880 (1991) and Section 61.55 of the Commission's rules, 47 C.F.R. § 61.55.

[4] The arguments in both TFG's petition and AT&T's reply relating to the contract between those parties were submitted under requests for confidentiality. Both parties consider information about this contract to be proprietary.

[5] 47 U.S.C. § 201(b).

[6] TFG's Petition to Reject or, in the Alternative, to Suspend AT&T Contract Tariff Transmittal No. CT 2952 (filed Jan. 17, 1995) (TFG Petition (CT 2952)).

[7] Reply of AT&T Corp. (filed Jan. 20, 1995) (AT&T Reply (Tr. CT 2952)).

[8] TFG's Petition to Reject or, in the Alternative, Suspend AT&T Contract Tariff Transmittal No. CT 3441 (filed May 2, 1995) (TFG Petition (CT 3441)).

[9] Reply of AT&T Corp. (filed May 5, 1995) (AT&T Reply (Tr. CT 3441)).

[10] *See Suspension Order*.

[11] TFG's Petition (Tr. CT 2952) at 3. *See also* AT&T's Transmittal No. CT 2952, Section 5.B.1., modifying Contract Tariff No. 374. The modifications contained in Transmittal No. CT 2952 would increase volume requirements for some SDN international services by 3.3 percent in order for customers to qualify for new increased discounts. These new increased discounts for international traffic would take effect during the 18th through the 36th months of the customer's contract tariff term. Thus, these rates are simultaneously affected by two countervailing changes. First, the proposed revisions increase the amount of traffic necessary for a customer to qualify for the next level of discounts. Second, the proposed revisions provide a larger discount for a particular level of traffic.

[12] TFG Petition (Tr. CT 2952) at 3.

in a pending formal complaint against AT&T, File No. E 94-72, which alleges that AT&T has violated the Communications Act in connection with its provision of Contract Tariff No. 374 services to TFG.

4. PSE contends that Transmittal No. CT 2952 would violate both Section 202 of the Act[13] as well as the Commission's policies concerning contract tariffs because the proposed revisions unreasonably restrict the general availability of preferential rates offered in Contract Tariff No. 374. Specifically, PSE argues that the revisions to the contract tariff would give the original customer immediate rate stability[14] while new customers would have to wait eighteen months before obtaining rate stability.[15] PSE further asserts that rate stability for the full term is available only to a customer "prescient enough to have obtained CT 374 a year and a half ago, when the offering in its tariffed form had no rate stability."[16]

5. AT&T replies that neither the tariff nor the contract guarantees TFG a veto over all tariff changes.[17] AT&T states that Transmittal No. CT 2952 is designed to increase the discount percentage rates offered to TFG under Contract Tariff No. 374 in order to offset increases in AT&T's general tariff rates that form the basis for the non-discounted base rates in Contract Tariff No. 374. With regard to the proposed increases in the thresholds for international services, AT&T argues that the larger proposed discounts associated with each of those volume levels would more than offset the increases in the thresholds. AT&T states that, taken as a whole, the filing restores the effective "bottom line" for Software Defined Network (SDN) and READYLINE services as of the original filing date of the tariff.[18] In response to PSE, AT&T asserts that under Contract Tariff No. 374, as amended by Transmittal No. CT 2952, all provisions apply to all customers of the revised contract tariff. AT&T further claims that if PSE wanted the same terms that TFG obtained, it could have taken service under this contract tariff during the initial availability window when TFG obtained service.[19] Moreover, AT&T argues that customers are clearly better off under the revisions proposed in Transmittal No. CT 2952 than they were under Contract Tariff No. 374 as initially filed.[20]

C. Transmittal No. CT 3441

6. AT&T's Transmittal No. CT 3441 would remove the Transmittal No. CT 2952 provision that would terminate rate stability after February 20, 1997.[21] TFG argues that AT&T failed to notify TFG of the changes proposed in Transmittal No. CT 3441, and did not obtain its consent to those revisions.[22] Additionally, TFG asserts that the revisions in this transmittal would materially and adversely affect a number of TFG's rights under Contract Tariff No. 374 and the contract on which that contract tariff was based.[23] AT&T replies that Transmittal No. CT 3441 implements changes, suggested by the Commission, that would limit the benefits of the filing to TFG and avoid retroactive ratemaking.[24]

III. DESIGNATION OF ISSUES

7. We designate the following issues in the investigation of Transmittal Nos. CT 2952 and CT 3441.

> **Issue I:** Is AT&T required to satisfy the "substantial cause" doctrine before one or more of the tariff revisions proposed in Transmittal Nos. CT 2952 and CT 3441 become effective?
>
> **Issue II:** If the resolution of Issue I is in the affirmative, has AT&T shown substantial cause to make the revisions to Contract Tariff No. 374 proposed in Transmittal Nos. CT 2952 and CT 3441?

8. AT&T made no substantial cause showing in support of either Transmittal No. CT 2952 or CT 3441. In its direct case, AT&T, at a minimum, should address the applicability of the substantial cause doctrine[25] to the provisions in Transmittal Nos. CT 2952 and CT 3441 that require AT&T to file tariff revisions to offset any rate increases that exceed one percent in specified six-month periods[26] and the changes in the threshold amounts and discount percentages for international traffic.[27] AT&T may present arguments about why the substantial cause doctrine is not applicable in this instance. Assuming that substantial cause does gov-

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[13] 47 U.S.C. § 202.

[14] Contract Tariff No. 374 incorporates by reference AT&T's generally tariffed rates for two services provided under this contract tariff, the SDN and READYLINE Services. The contract tariff then discounts those general rates by specified percentages. Transmittal Nos. CT 2952 and 3441 would amend the tariff to provide "rate stability" by increasing these contract tariff discounts under certain circumstances. Specifically, the transmittals provide that, if during any one of several specified six-month periods, AT&T's generally tariffed after-discount rates for SDN and READYLINE services increase by more than one percent, the contract tariff discounts applicable to those services shall be raised to reverse the effect of these rate increases. *See* Transmittal Nos. CT 2952 and CT 3441 at Section 4.

[15] PSE Petition at 3.

[16] *Id.* at 5.

[17] AT&T Reply (Tr. CT 2952) at 2.

[18] *Id.* at 3.

[19] *Id.* at 5.

[20] *Id.* at 6.

[21] This revision rendered one of PSE's arguments moot. PSE had argued that the existence of the February 20, 1997 cutoff date limited it and other new customers to, at most, seven and a half months of rate stability while the original customer enjoyed a full eighteen months of rate stability. PSE argued that this was discrimination in violation of Section 202 of the Communications Act, 47 U.S.C. § 202. *See* PSE Petition at 4. The removal of this cutoff date, however, would eliminate this disparity. *See* Contract Tariff No. 374, Transmittal No. CT 3441 at Section 4.

[22] TFG Petition (Tr. CT 3441) at 3.

[23] *Id.* at 2 and 4.

[24] AT&T Reply (Tr. CT 3441) at 5.

[25] *See Showtime Networks, Inc. et. al. v. F CC*, 932 F.2d 1 (D.C. Cir. 1991); RCA American Communications, Inc. v. F.C.C., Case Nos. 811558 and 81-1597 (unpublished Judgement and Memorandum issued on July 21, 1982) (*Memorandum*); RCA American Communications, Inc., 86 FCC 2d 1197 (1981) (*1981 Order*); Memorandum Opinion and Order, 94 FCC 2d 1338 (1983) (*Response to Remand Order*); Memorandum Opinion and Order, Mimeo No. 6153 (Com. Car. Bur. Released August 6, 1985) (*Investigation Order*); Memorandum Opinion and Order, 2 FCC Rcd 2363 (1987) (*Final Order*); AT&T Communications, Revisions to Tariff F.C.C. No. 2, Transmittal Nos. 2404 and 2535, 5 FCC Rcd 6777 (Oct. 31, 1990); Competition in the Interstate Interexchange Marketplace, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 4562 at 4573-74 (Feb. 17, 1995) (*Interexchange Reconsideration Order*).

[26] Contract Tariff No. 374, Transmittal No. CT 2952 at Section 4.

[27] *Id.* at Section 5.B.1.

ern this proceeding, AT&T should discuss the specific "commercial contract principles," if any, that are applicable to an analysis of the lawfulness of these transmittals, how such commercial contract principles should be applied to the revisions in Contract Tariff No. 374 (taking into account the non-tariffed contract between AT&T and TFG) and the impact of applying those principles in this instance. AT&T also may address the legal relevance of the non-tariffed contract with TFG to a "substantial cause" analysis predicated upon commercial contract principles. AT&T may also adduce factual arguments to demonstrate that proposed revisions satisfy the "substantial cause" standard.

IV. PROCEDURAL MATTERS

A. Filing Schedules

9. This investigation, to be identified as CC Docket No. 95-133, will be conducted as a notice and comment proceeding during which AT&T bears the burden of proof to show substantial cause for the suspended modifications to Contract Tariff No. 374.[28] AT&T is designated as a party to this proceeding and shall file its direct case no later than 14 days after the release of this Order. The direct case must present the party's position with respect to the issues described in this Order. Pleadings responding to the direct cases may be filed no later than 28 days after the release of this Order, and must be captioned "Opposition to Direct Case" or "Comments on Direct Case." The parties may each file a "Rebuttal" to oppositions or comments no later than 35 days after the release of this Order.

10. An original and four copies of all pleadings must be filed with the Secretary of the Commission. In addition, one copy must be delivered to the Commission's commercial copying firm, International Transcription Service, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Also, one copy of each pleading must be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Members of the general public who wish to express their views in an informal manner regarding the issues in this investigation may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Such comments must specify the docket number of this investigation.

11. All relevant and timely pleadings will be considered by the Commission. In reaching a decision, the Commission may take into account information and ideas not contained in pleadings, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of reliance on such information is noted in the Order.

B. Ex Parte Requirements

12. *Ex parte* contacts (*i.e.*, written or oral communications which address the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding during the time periods established by the Commission's rules. Written *ex parte* contacts must be filed on the day submitted with the Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200 *et seq.* of the Commission's Rules, 47 C.F.R. § 1.1200 *et seq.*

C. Paperwork Reduction Act

13. The investigation established in this Order has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or recordkeeping, labeling, disclosure or other record retention requirements as contemplated under the statute. *See* 44 U.S.C. § 3502(4)(A). The request for information contained herein is not subject to the clearance procedures of 44 U.S.C. § 3507.

V. ORDERING CLAUSES

14. ACCORDINGLY, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), and 204(a) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 204(a), AT&T Corporation SHALL RESPOND to the issues designated in this Order Designating Issues for Investigation, no later than 14 days from the release of this order. Interested parties may file pleadings responding to the direct cases no later than 28 days from the release of the order and AT&T Communications may file a rebuttal no later than 35 days after the release of the order.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

[28] *See* Section 204(a) of the Communications Act, 47 U.S.C. § 204(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

JOPPA ASSOCIATES, L.P., d/b/a
CONSOLIDATED CABLEVISION

Appeals of Local Rate Orders
of the following Cities:
Benton Charter Township, Michigan MI0200
St. Joseph, Michigan MI0566

CONSOLIDATED ORDER

Adopted: September 11, 1995; Released: September 15, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. By this Order, we consolidate two appeals of local rate orders filed on September 28, 1994 by Joppa Associates, L.P., d/b/a Consolidated Cablevision ("Consolidated") and rule on the merits in each proceeding. In deciding this matter, the Bureau has reviewed all the pleadings filed in the separate proceedings. We have determined that the proceedings are sufficiently similar to justify the resolution of all the issues raised by each of the concerned parties in one consolidated proceeding.[1] Specifically, the Bureau resolves in this Consolidated Order the two separate appeals of local rate orders issued by the local franchising authorities, Benton Charter Township and St. Joseph, Michigan ("the Cities"). Consolidated initially filed for its rate increase with the Cities on June 30, 1994. The Cities dismissed the filings without prejudice for not being timely filed. On August 5, 1994, Consolidated refiled with the Cities. Both St. Joseph's and Benton Charter's local rate orders were issued on August 30, 1994. The rate orders deny proposed rate increases for Consolidated's basic service tier rates.[2]

2. In the Cities' reviews of Consolidated's Form 1210s, which Consolidated filed in order to obtain approval for its proposed rate increases, the Cities rejected Consolidated's proposed increases for its basic service tier, ruling that Consolidated had to take into account revenue earned from home shopping channels in calculating its proposed rate adjustments. Consolidated argues that the Commission has already ruled that home shopping channel revenues are irrelevant to proposed rate increases such as those sought here by Consolidated.[3] Consolidated argues that the Cities should be assessed forfeitures in the amount of $50,000 each for their disregard of the Commission's ruling. In their oppositions dated October 14, 1994,[4] the Cities state that the appeals are not timely; that the Commission's ruling on home shopping channels cannot apply generally and is only binding on the parties to whom it was addressed; and that the First Amendment of the United States Constitution requires that the Commission have a compelling government interest before it may grant a preference to certain programmers based on content. The Cities state that if the Commission applies the home shopping rulings generally, the Cities should be granted a waiver. On November 3, 1994, Consolidated filed Replies to the Cities' oppositions.[5]

II. DISCUSSION

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[6] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[7] The Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[8] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[9]

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[1] Except for minor factual variations, the two separate appeals are identical and raise the same issue: whether the local franchising authorities were correct in insisting that Consolidated must file information regarding home shopping channel revenues as part of its Form 1210 filing.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[3] Consolidated cites Letter to QVC Network, Inc. from Patrick J. Donovan on behalf of Alexandra M. Wilson, Acting Chief, Cable Services Bureau (May 9, 1994) ("QVC Letter"); and Letter to The Home Shopping Network from Patrick J. Donovan on behalf of Alexandra M. Wilson, Acting Chief, Cable Services Bureau (May 9, 1994) ("HSN Letter").

[4] The Cities filed a Motion to Accept Late Filing with their oppositions. Because Consolidated has not opposed the late-filed pleadings, we grant the motions.

[5] On November 28, 1994, the Cities each filed a Reply to Consolidated's Reply and a Motion for Leave to File Reply. On December 7, 1994, Consolidated filed Oppositions to the motions filed by the Cities. Our rules do not provide for a reply to a reply. Under the Commission's rules, additional pleadings may be filed only if specifically requested or authorized by the Commission. 47 C.F.R. §1.45(c). We did not request an additional filing from the Cities, nor have they provided us with a compelling reason to authorize the filing of their additional pleading. Therefore, the Cities' Motion for Leave to File Reply is denied. We note, however, that the arguments contained in the Cities' Reply would not have changed the Commission's decision as set forth in this Order.

[6] *See* 47 C.F.R. § 76.944.

[7] *See* Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266, 8 FCC Rcd 5631, 5731(1993) (*"Rate Order"*); Third Order on Reconsideration in MM Docket 92-266, FCC 94-40, 9 FCC Rcd 4316, 4345 (1994) (*"Third Recon. Order"*).

[8] *Id.*

[9] *Id.*

4. FCC Form 1210 is the official form an operator uses to justify adjustments in the rates it computed on its FCC Form 1200, the form used to establish an operator's initial maximum permitted rates under our rules that went into effect May 15, 1994, or on a previously filed Form 1210. An operator may increase its rates to reflect increases in external costs, increases in the number of channels, and inflation.[10] Among the categories of external costs with respect to which operators can make adjustments to their rates are programming costs. An operator may file to increase its basic rates on account of changes in external costs for the period from the end of the last quarter for which an adjustment was previously made through the end of the quarter that has most recently closed preceding the filing of the Form 1210.[11] An operator may file a Form 1210 up to quarterly, but must file within the quarter following a decrease in costs due to channel deletions and within a year following a decrease in other costs.[12] An operator must file for a rate increase within a year of its increase in costs in order to recover those costs in its rates.[13]

A. Timeliness

5. In their oppositions, the Cities state that Consolidated's appeals were not timely filed since Consolidated failed to appeal the Cities' initial dismissal of Consolidated's original Form 1210 filings. The Cities contend that Consolidated should have raised any issues related to those filings within 30 days of the dismissal. Consolidated filed its Form 1210s on June 30, 1994. The City of St. Joseph dismissed without prejudice Consolidated's Form 1210 on July 25, 1994 and Benton Charter Township did the same on July 28, 1994, based on the timeliness of the filings, and on Consolidated's failure to provide the home shopping channels' revenue data. Shortly after the dismissals, on August 5, 1994, Consolidated refiled with the Cities. By definition, "dismissal without prejudice" means that the dismissal affects no right or remedy of the parties, is not on the merits, and does not bar a subsequent suit on the same cause of action.[14] Consequentiy, when the Cities issued their final orders on August 30, 1994, Consolidated was free to appeal any issue relating to those filings and to that order. We therefore reject the Cities' argument that Consolidated's appeals are untimely.

B. Home Shopping Channels Revenue Data

6. Consolidated challenges the Cities' request that it submit information on its Form 1210 regarding the revenue it receives from home shopping channels. In our *Rate Order*, we determined that any revenues an operator receives from a programmer or shares with a programmer must be offset against programming costs for purposes of calculating whether there has been an increase or decrease in programming costs.[15] The Commission codified this requirement in the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking* ("*Second Reconsideration Order*").[16] In response to inquiries, the Bureau has stated that the rules require only that payments from programmers to operators must be offset on a per channel basis.[17] In other words, revenue an operator receives from a particular channel is only used to offset programming costs of that channel. If revenue exceeds programming costs, no costs are entered for that channel, but the excess revenue cannot be used to offset programming costs from other channels. The Commission codified this revision as part of the *Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking* ("*Going Forward Order*").[18]

7. Since revenues are offset against programming costs on a per-channel basis, home shopping revenue is only relevant to calculate adjustments to the respective home shopping channel costs. Consolidated has stated that it does not pay for carriage of its home shopping channels, and that its increase in programming costs did not include any costs for its home shopping channels.[19] For these reasons, and because the home shopping revenues cannot offset increases in programming costs from other channels, Consolidated is correct in stating that the information requested was "not relevant" to the consideration of the rate increase.

8. The Cities argue that the Bureau letters[20] on which Consolidated relies cannot apply generally, and that the lettersare only binding on the parties to whom they were intended. The letters at issue were a clarification of our rules.[21] Consolidated was entitled to rely on them as an interpretation of our rules in determining its rates. The Cities also contend that the First Amendment requires that if the Commission's rules make a content-based distinction among programmers, the Commission must have a compelling reason in support thereof.[22] We find this argument lacks merit. The Commission's rules treat all channels the

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[10] At the time of Consolidated's filings, an operator could adjust its full reduction rates for inflation, but not its provisional rates. Since that time, however, the Commission has ruled that an operator may also adjust its provisional rates for inflation. *See* Ninth Order on Reconsideration in MM Docket No. 92-266, FCC 95-43 (rel. Feb. 6, 1995).

[11] 47 C.F.R. § 76.922(d)(3)(iii).

[12] 47 C.F.R. §§ 76.922(d)(3)(i) & (ii). Inflation may only be recovered for increases in costs that are not external costs as defined in our rules. 47 C.F.R. §§ 76.922(d)(2), .922(d)(3)(iv).

[13] 47 C.F.R. § 76.922(d)(3)(i).

[14] *See, e.g.*, Brunswick Corp. v. Chrysler Corp., 287 F. Supp. 776, 777-78 (E.D. Wisc. 1968).

[15] *Rate Order*, 8 FCC Rcd at 5789 n.602.

[16] Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994). *See* 47 C.F.R. § 76.922(d)(3)(x) (1993).

[17] QVC Letter; and HSN Letter.

[18] *Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-286, 10 FCC Rcd 1226, 1252 (1994); 47 C.F.R. § 76.922(d)(3)(x). While the *Sixth Order on Reconsideration* also required the operator to offset revenues received from programmers against its per-channel adjustment under the new going forward methodology, *id.*, the *Twelfth Order on Reconsideration*, MM Docket No. 92-266, FCC 95-343 (rel. Aug. 8, 1995) eliminated this additional requirement.

[19] Petitions at 5, n.4.

[20] *See* n.4, *supra*.

[21] QVC Letter at 2 ("Accordingly, we clarify that Section 76.922(d)(3)(x) of the Commission's rules, and the relevant portions of the instructions to FCC Form 1210, require only that payments from programmers to operators be offset on a channel-by-channel basis.")

[22] *See, e.g., Turner Broadcasting System, Inc. v. FCC*, _____ U.S. _____; 114 S. Ct. 2445 (1994).

same, i.e., the revenues derived from each channel are offset against the programming costs for that channel without regard to the content of such programming. Thus, contrary to the Cities' assertion, the letters did not create a content based policy. Lastly, the Cities state that if the Commission generally applies the position taken in the QVC and HSN Letters, they should be granted a waiver of the rule because Consolidated carries an excessive number of home shopping channels. To grant such a waiver would require us to distinguish programming content, which we decline to do.[23] For all these reasons, we remand this case to the Cities, with instructions to review the Form 1210 Consolidated has provided in a manner consistent with this decision.[24]

III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that the Appeals of Joppa Associates, L.P., d/b/a Consolidated Cablevision of the local rate orders issued by Benton County Township and the City of St. Joseph, Michigan, with respect to calculation of home shopping revenue data, ARE REMANDED to the Cities for resolution in accordance with this Order.

10. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[23] *Id.*

[24] Consolidated also requests that the Cities be assessed forfeitures of $50,000 each for their insistence that Consolidated provide the home shopping channels' revenue data, even though Consolidated had provided the Cities with the QVC Letter and the HSN Letter. Our rules address when forfeitures are appropriate. 47 C.F.R. § 1.80(a). We do not believe forfeitures are appropriate in the situation before us.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COX COMMUNICATIONS, INC.

Appeal of Local Rate
Order of the City of
Laguna Hills, California

MEMORANDUM OPINION AND ORDER

Adopted: September 11, 1995; Released: September 15, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On May 11, 1995, Cox Communications, Inc. ("Cox"), formerly Times Mirror Cable Television of Orange County, Inc. d/b/a Dimension Cable Services,[1] filed with the Commission an appeal of the local rate order released on April 12, 1995 by the City of Laguna Hills, California (the "City").[2] In its order, the City rescinded an earlier order issued on September 13, 1994 which had been remanded by the Commission for further proceedings. The Commission's order remanding the earlier local rate order was based on an appeal filed by Cox on October 13, 1994.[3] On March 10, 1995, the Commission granted in part and denied in part Cox's earlier appeal and remanded the City's September 13, 1994 rate order for further proceedings.[4] In *Times Mirror of Orange County*, we held, among other things, that the City had improperly disallowed a charge Cox assessed on cable programming service (CPS) tier subscribers with additional outlets.[5] In the most recent local rate order, the City again disallowed the additional outlet charge. Cox asserts that the City's action was in violation of our rules and earlier order since the Commission, not local franchising authorities, has exclusive jurisdiction to resolve disputes over CPS-related charges.

II. DISCUSSION

2. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[6] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[7] The Commission will reverse a franchising authority's decision only if the Commission determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[8] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[9]

3. As we previously held, because the additional outlet charge is imposed only in connection with programming carried on the CPS tier, the Commission, not the City, has jurisdiction over this matter.[10] Since the City lacked jurisdiction to rule on the matter, we will grant Cox's appeal. We again remand this issue to the City with a strong admonition that it take prompt steps to modify its local rate order in conformance with our prior order. Failure to do so may result in further action by the Commission, including review of the City's authority to regulate basic rates. If any party to an appeal disagrees with our ruling on an issue, it should pursue the remedies provided by our rules, *see* 47 C.F.R. §§ 1.106 and 1.115. It may not, as the City did here, simply disregard the ruling.

III. ORDERING CLAUSES

4. Accordingly, IT IS ORDERED that Cox's appeal IS GRANTED. IT IS FURTHER ORDERED that the City's local rate order IS REMANDED to the City for resolution in accordance with the terms of this Order.

5. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[1] Cox's parent company, Times Mirror Cable Television, Inc., was merged into Cox Communications, Inc. on January 31, 1995.

[2] The City did not file an opposition to the instant appeal.

[3] The City filed an opposition to that appeal on October 31, 1994 to which Cox filed a reply on November 10, 1994.

[4] Times Mirror Cable Television of Orange County, Inc., d/b/a Cox Cable Services (Laguna Hills, California), DA 95-451 (Cab. Serv. Bur., released March 10, 1995) (*"Times Mirror of Orange County"*).

[5] *Id.* at ¶ ¶ 8-9.

[6] 47 C.F.R. § 76.944.

[7] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, MM Docket 92-266, 8 FCC Rcd 5631, 5837 (1993) (*"Rate Order"*); and Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, Third Order on Reconsideration, MM Docket No. 92-266 and 92-262, 9 FCC Rcd 4316, 4346 (1994) (*"Third Reconsideration Order"*).

[8] *Id.*

[9] *Rate Order*, 8 FCC Rcd at 5732; *Third Reconsideration Order*, 9 FCC Rcd at 4346.

[10] *Times Mirror of Orange County*, DA 95-451 at ¶ ¶ 8-9.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CONTINENTAL CABLEVISION
OF OHIO, INC.

Appeal of Local Rate
Order of City of Mentor, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: September 11, 1995; Released: September 15, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On April 19, 1995, Continental Cablevision of Ohio, Inc. ("Continental"), filed an Appeal of a local cable rate order adopted by its local franchising authority, the City of Mentor, Ohio (the "City). The City filed an Opposition to Continental's Appeal on May 4, 1995. Continental submitted a Reply to the City's Opposition on May 15, 1995. On April 19, 1995, Continental also filed a Request for Emergency Stay of the local rate order.[1]

2. In its local rate order, the City approved Continental's Form 393 rates and its Form 1200 rates for the basic service tier and associated equipment,[2] but found that Continental did not meet the necessary requirements to take advantage of the refund deferral period from May 15 to July 14, 1994[3] and required Continental to issue subscriber refunds for overcharges assessed during that period. In its Appeal, Continental challenges only that portion of the local rate order in which the City required Continental to issue refunds to subscribers for the period from May 15 to July 14, 1994. Continental argues that it intended to take advantage of the deferral period, that it satisfied the requirements to do so, and that the City cannot impose refund liability in a manner not in conformance with the Commission's rules. The City responds that Continental did not satisfy all of the necessary requirements for deferral, that Continental did not therefore qualify for deferral of the refund period, and that the overcharges assessed during the period must be returned.

II. STANDARD OF REVIEW

3. Under the Commission's rules, appeals of franchising authorities' local rate orders are reviewed by the Commission.[4] In ruling on an appeal of a local rate order, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[5] The Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering a local rate order.[6] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[7]

III. BACKGROUND

4. On November 22, 1993, Continental submitted FCC Form 393 to the City.[8] At the City's request, Continental supplied the City with additional information on January 18, 1994 and April 5, 1994. The City was still in the process of reviewing Continental's Form 393 when the Commission released the *Second Recon. Order*, which revised our rate regulations.

5. Under the terms of the *Second Recon. Order*, operators were required to comply with the revised regulations by May 15, 1994.[9] The Commission recognized, however, that many operators would need more time to change their rates to bring them into compliance with the revised rules. The Commission therefore provided that if an operator needed to reduce its rates in order to comply with the revised regulations, exposure to possible refund liability could be deferred from May 15, 1994 until July 14, 1994 if certain conditions were met.[10] The *Second Recon. Order* set out these general conditions: (1) the cable operator could not change its rates for any regulated service or equipment or restructure any regulated service or equipment offering

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[1] Because we are resolving this dispute on the merits presented in the appeal, the petition for stay has been rendered moot.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992, and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service, associated equipment and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b). Local franchising authorities review the information contained in the FCC Form 393, and its successor forms, in order to determine cable operators' maximum permitted rates for basic service, associated equipment, and installations under the Commission's rate regulations. *See*, Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266, 8 FCC Rcd 5631, 5770 (1993) (*"Rate Order"*). As part of the rate review process, Continental submitted an FCC Form 393 ("Determination of Maximum Initial Permitted Rates for Regulated Cable Programming Services and Equipment") to the City on November 22, 1993 and an FCC Form 1200 on August 24, 1994.

[3] An operator was able to defer refund liability under our rules which became effective May 15, 1994 for the period from May 15 through July 14, 1994 if certain conditions were met. *See* Second Order on Reconsideration, Fourth Report and Order, Fifth Notice of Proposed Rulemaking in MM Docket 92-266, 9 FCC Rcd 4119, 4184 (1994) (*"Second Recon. Order"*).

[4] 47 C.F.R. §76.944.

[5] *See Rate Order*, 8 FCC Rcd at 5731; In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Third Order on Reconsideration in MM Docket 92-266, 9 FCC Rcd 4316, 4346 (1994) (*"Third Recon. Order"*).

[6] *Id.*

[7] *Id.*

[8] FCC Form 393 is the official form used by cable operators to determine whether their rates for programming, equipment and installations were reasonable for the period beginning September 1, 1993 and ending May 15, 1994.

[9] *Second Recon. Order*, 9 FCC Rcd at 4183.

[10] *Id.* at 4184.

between March 30, 1994 and July 14, 1994; (2) the operator had to give subscribers at least 30 days' notice of any rate or service change made pursuant to the new rules; and (3) all rate and service restructuring must have been completed by July 14, 1994.[11] Section 76.922 (b)(6)(ii) of our rules codifies the first and third of these prerequisites.[12] Section 76.964 effectively codifies the second requirement because even though this section does not refer to any prerequisites for qualifying for the deferral period this section does require that an operator give 30 days' written notice to subscribers before implementing any rate change.[13]

6. With respect to operators such as Continental, which were "involved in proceedings concerning basic cable rates" at the time of the release of the *Second Recon. Order*, that Order imposes two additional conditions for qualifying for refund deferral.[14] The Order required that any such operator which "elects to take advantage of the refund deferral period," had to notify the local franchising authority by June 14, 1994 that it intended to do so.[15] The Order also provides that such an operator had to submit the relevant FCC rate justification forms to the local franchising authority no later than August 15, 1994.[16]

7. Continental made no changes in its rates between May 15, 1994 and July 14, 1994. On the latter date, it reduced its rates to comply with the Commission's revised benchmark regulations. Continental also provided appropriate notice to subscribers of the rate changes 30 days in advance. Continental does not contend that it provided any formal notice to the City that it was taking advantage of the deferral period. However, on June 20, 1994, the City received a copy of a Form 1200[17] filing from a law firm, addressed to the Commission and relating to Continental's cable programming service rates in the City of Roseville, Michigan ("Roseville CPS Filing"). The City ignored this document since it was from an unfamiliar law firm, was addressed to the FCC and involved another city in a different state.[18] On August 15, 1994, the City received a Form 1205 regarding Continental's rate for a new addressable converter.[19] Since the City had not yet received a Form 1200, the City contacted Continental on August 22, 1994 and asked why the City had not received a copy of Form 1200. Continental said it had mailed the form on August 14, 1994 and would send another copy. A copy of Form 1200 with a cover letter dated August 17, 1994 was received by the City on August 24, 1994. The cover letter stated that this Form was previously mailed to the City on June 14, 1994, but that a postal or other type of error may have prevented the City from receiving a copy.

8. The City sent a letter to Continental on August 31, 1994, which the City amended by a letter dated September 30, 1994, informing Continental that, if the City's review of Continental's filings indicated that refunds were required, it would not be eligible for the refund deferral period since Continental had failed to comply with the Commission's requirements. The City noted that Continental's Form 1200 was filed nine days late and that the only document it received in June was the Roseville CPS Filing. On December 5, 1994 the City requested additional information from Continental. Continental submitted the additional information on January 13, 1995. On March 21, 1995, the City issued a rate order finding that the rates set forth in Continental's Form 393 and 1200 filings were reasonable and thereby approved. However, the City also found that "Continental has failed to comply with all the terms set by the FCC for obtaining the benefits of the deferral extension period."[20] The City therefore found that Continental should have implemented its reduced rates on May 15, 1994. The City thus concluded that Continental's rates between May 15, 1994 and July 14, 1994 were unreasonable and ordered Continental to make the appropriate refunds for that period.

IV. DISCUSSION

9. The sole issue raised in Continental's Appeal is whether Continental complied with all necessary conditions imposed by the Commission to qualify for the refund deferral period from May 15 to July 14, 1994. Continental argues there are only three such conditions; the City argues that two additional requirements are imposed in certain cases. Both parties agree that Continental has complied with the three general prerequisites of the *Second Recon. Order* relating to (1) stability of rates prior to July 15, 1994, (2) 30 days notice to subscribers, and (3) completion of rate restructuring by July 14, 1994.[21] Continental argues that these are the only conditions an operator had to meet in order to qualify for the deferral period. The City maintains that while these are the general requirements for qualifying for the refund deferral period, the Commission imposed additional conditions on those operators, like Continental, who were "currently involved in proceedings concerning basic cable rates" before a local franchising authority.[22] The City further contends that Continental did not comply with the two additional notice and filing requirements the Commission has imposed on such operators. Continental maintains that the Commission did not specify additional notice or filing requirements as conditions for refund deferral.

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[11] *Id.* at 4183-4185.

[12] 47 C.F.R. § 76.922(b)(6)(ii).

[13] 47 C.F.R. § 76.964. This section also requires that, in addition to other notice requirements, a cable operator "shall give the relevant franchising authority a minimum of 30 days advance written notification of any changes in rates for cable programming service or associated equipment." The notice must state the precise amount of any rate change and explain the cause of the rate change. While the parties agree that appropriate notices were sent to subscribers they do not contend that such a notice was delivered to the local franchising authority.

[14] *Second Recon. Order*, 9 FCC Rcd at 4187.

[15] *Id.* at 4187 n.190.

[16] *Id.*

[17] FCC Form 1200 is the official form used to review rates for programming, equipment, and installations beginning May 15, 1994 or upon the expiration of the deferral period.

[18] *See* Pohl Declaration at 3.

[19] FCC Form 1205 is the official form used to determine equipment costs beginning May 15, 1994 or upon the expiration of the deferral period.

[20] Rate Order at § 2(d).

[21] *See* Appeal at 2; Opposition at 13.

[22] *Second Recon. Order*, 9 FCC Rcd at 4187.

10. The *Second Recon. Order* provides that:

> [I]f the operator elects to take advantage of the deferral of refund liability described above at para. 135-138, *supra*, it must notify the local franchising authority by [June 14, 1994] that it is electing that option. The [operator] will then have 30 days from the date on which it ultimately restructures its rates to submit the relevant FCC forms, although in no event will such forms be filed more that 30 days after July 14, 1994....[23]

The City is correct that this passage in the *Second Recon. Order* requires that operators who were involved in basic rate proceedings at the time of the release of that Order had to meet these two additional requirements in order to qualify for the refund deferral period. Since Continental was such an operator, we conclude that the City properly found that Continental had to meet the two additional notice and filing requirements in order to take advantage of the refund deferral period.

11. The City further argues that Continental failed to meet each of these two additional conditions. As to the first requirement, that an operator notify the franchising authority by June 14, 1994 that it elected to take advantage of the deferral period, Continental argues that we should find that the following constituted actual or constructive notice to the franchising authority that it intended to take advantage of the refund deferral period: (1) the City's receipt of the Roseville CPS Filing on June 20, 1994; (2) the subscriber notification[24] that, Continental alleges, included various city officials; and, (3) the fact that the revised lower rates were implemented on July 14, 1994. We decline to make a finding that these actions constituted timely notice to the City that Continental intended to take advantage of the deferral period. As to whether the Roseville CPS Filing could serve as notice of Continental's intention to take advantage of the deferral period, the City did not receive this document by the June 14, 1994 deadline for notifying the franchising authority. Even if the Roseville CPS Filing had been timely received, it was not addressed to the City and referred to a different community in a different state. Nor did this document refer to the deferral option. Therefore, the Roseville CPS Filing could not have served as a timely filing of the required notice to the City.[25] In addition, nothing in the record supports Continental's argument that the 30-day subscriber notification should serve as the required notice to the franchise authority of Continental's election to take advantage of the deferral period. Continental submitted no evidence that the subscriber notification was received by any particular City official nor do we have any evidence that this notification referred to an election to defer refund liability. Finally, the fact that Continental lowered its rates on July 14, 1994 cannot serve as the notice that we required by June 14, 1994 of operators seeking to take advantage of the deferral period since it took place a month after the notice was required. For all of these reasons, we find that Continental did not notify the local franchising authority of its decision to take advantage of the refund deferral period by June 14, 1994 as required by the *Second Recon. Order*. We further find that Continental's actions did not constitute constructive notice to the City of such a decision. Continental should have taken some steps, in a timely fashion, which would have enabled the City to reasonably conclude that Continental intended to take advantage of the deferral period. While we do not require any particular form that the notice must take, a short letter from Continental sent to the City by June 14, 1994, simply stating that Continental intended to take advantage of the deferral period would have been sufficient.

12. As to the final requirement for refund deferral, that an operator submit the relevant rate justification forms to the franchising authority by August 15, 1994, Continental admits thatit did not submit its Form 1200 to the City by the August 15, 1994 deadline. Continental's Form 1200 filing was received by the City on August 24, 1994 and accompanied by a cover letter dated August 17, 1994. Continental argues, however, that the City's failure to notify Continental that it had received an incorrect Form 1200, (the Roseville CPS filing), should preclude the City from taking advantage of its own inaction and that the City was not prejudiced by the late filing. We do not need to decide whether, under the facts in this case, Continental's late filing of the relevant forms in and of itself would prevent it from qualifying for the refund deferral period since we have already determined that Continental did not meet the notice requirement for refund deferral.

13. Finally, Continental argues that requiring a refund in this case would constitute a penalty and be inconsistent with the Commission's objective of rational and fair implementation of its rate regulations. A finding that a refund is due since Continental did not qualify for the deferral period does not constitute the imposition of a penalty. The Commission's revised benchmark regulations became effective May 15, 1994.[26] Subscribers were entitled to receive the benefit of reduced rates under the new regulations from that date forward unless the operator qualified for the refund deferral period. It does not constitute a penalty to enforce the revised rate regulations beginning with their effective date. Since Continental did not meet all of the requirements for the refund deferral period, we therefore deny Continental's appeal.

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[23] *Id.* at 4187 n.190.

[24] Continental had provided notice to subscribers of the July 15, 1994 rate changes 30 days in advance. *See* para. 7, *supra*.

[25] Continental alleges that a "mailing error" prevented the City from receiving the correct document in June of 1994. However, the document that Continental alleges it intended to submit was not a notice to the City that Continental was electing to take advantage of the refund deferral period. The document that Continental claims it intended to submit to the City in June was a copy of a cable programming service rate filing made with the Commission for Mentor, Ohio ("Mentor CPS Filing"). The Mentor CPS Filing did not refer in any way to an election to take advantage of the deferral period. In fact, the letter accompanying the Mentor CPS Filing was not even addressed to the City, referred only to cable programming services rates and did not mention basic service or equipment and installation rates.

[26] *Second Recon. Order*, 9 FCC Rcd at 4183.

V. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that the Appeal filed by Continental Cablevision of Ohio, Inc. IS DENIED.

15. IT IS FURTHER ORDERED that the Request for the Stay of the City of Mentor's rate order filed by Continental Cablevision of Ohio, Inc. IS DISMISSED as moot.

16. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 11, 1995

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON SWBT'S COMPARABLY EFFICIENT INTERCONNECTION PLANS

CC Dockets Nos. 85-229, 90-623 and 95-20

CCBPol 95-7

On August 3, 1995, Southwestern Bell Telephone Company (SWBT) filed three Comparably Efficient Interconnection (CEI) Plans for new enhanced services: Internet Access Service; PC Backup and Recovery Service; and Facsimile Service. SWBT states that these enhanced services use only tariffed network services available to other enhanced service providers at the same tariffed rates, and on the same terms and conditions. SWBT requests expedited approval of these plans.

SWBT states that Internet Access Service will allow users to access all services available on the Internet including access to information resources, transfer of files, communication via E-mail and other services as they become available. SWBT states that the Internet Access Service will include these individual service offerings: (1) local access, using the Public Switched Telephone Network or dedicated facilities; (2) access to end user enhanced services; (3) access to Help Desk Services; (4) provision of Internet software; and (5) access to Interexchange Internet Access Providers.

SWBT states that PC Backup and Recovery Service is a local telephone network-based service that will automatically backup and provide secure off-premise storage for data residing on the hard drive of a stand-alone PC or PC-based server for a local area network. SWBT states that Facsimile Service will provide customers with a wide range of facsimile capabilities that will enable them to communicate via facsimile beyond the traditional send/receive only mode. SWBT states that four types of Facsimile Services will be offered: Fax Broadcast, Fax Mailbox, Fax Overflow, and Fax on Demand.

Interested parties may file comments on the CEI Plans by **August 25, 1995**, and reply comments by **September 1, 1995**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Janice M. Myles, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Parties filing comments in this non-docketed proceeding should include the Policy Division internal reference number, CCBPol 95-7, on their pleadings. SWBT's CEI Plans are available for inspection and copying in the Industry Analysis Division reference room, Common Carrier Bureau, Room 533, 1919 M Street, N.W., Washington, D.C. Copies of these filings can be obtained from ITS, Inc. at (202) 857-3800.

We will treat these proceedings as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§1.1200-1.1216. For further information contact Janice M. Myles, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1577.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Emery Telephone

Notice of Apparent Liability for Forfeiture for Station KNKO305 in the Rural Radio Service at Castle Dale, Utah	File No. 316MS0020
Notice of Apparent Liability for Forfeiture for Station KNKM777 in the Rural Radio Service at Castle Dale, Utah	File No. 316MS0022
Notice of Apparent Liability for Forfeiture for Station KNKM779 in the Rural Radio Service at Orangeville, Utah	File No. 316MS0023
Notice of Apparent Liability for Forfeiture for Station KNKO304 in the Rural Radio Service at Ferron, Utah	File No. 316MS0024
Notice of Apparent Liability for Forfeiture for Station KNKO306 in the Rural Radio Service at Emery, Utah	File No. 316MS0025
Notice of Apparent Liability for Forfeiture for Station KNKO307 in the Rural Radio Service at Horn Mountain, Utah	File No. 316MS0026
Notice of Apparent Liability for Forfeiture for Station KNKO767 in the Rural Radio Service at Horn Mountain, Utah	File No. 316MS0027
Notice of Apparent Liability for Forfeiture for Station KNKO786 in the Rural Radio Service at Horn Mountain, Utah	File No. 316MS0028

MEMORANDUM OPINION AND ORDER

Adopted: Septemer 11, 1995; Released: September 15, 1995

By the Chief, Enforcement Division: Wireless Telecommunications Bureau

I. INTRODUCTION

1. Emery Telephone (Emery) has filed a Reply, in which it has consolidated its request for a complete or partial recision of the forfeitures of eight separate Notices of Apparent Liability for Forfeitures (NALFs), each in the amount of $4,000. *See: Emery Telephone*, 9 FCC Rcd 3560 (1994); *Emery Telephone*, 9 FCC Rcd 3561 (1994); *Emery Telephone*, 9 FCC Rcd 3562 (1994); *Emery Telephone*, 9 FCC Rcd 3563 (1994); *Emery Telephone*, 9 FCC Rcd 3564 (1994); *Emery Telephone*, 9 FCC Rcd 3565 (1994); *Emery Telephone*, 9 FCC Rcd 3566 (1994); *Emery Telephone*, 9 FCC Rcd 2524 (1994). For the reasons discussed below, we grant Emery's request to reduce the forfeiture amounts.

II. BACKGROUND

2. On January 24, 1991, September 26, 1991, August 13, 1992, and September 15, 1992, the Commission granted separate authorizations to Emery to operate on eight frequencies in various locations in rural Utah. The expiration dates of these authorizations were January 24, 1992, September 26, 1992, August 13, 1993, and September 15, 1993 respectively. In November, 1993, the Bureau notified Emery that two of its stations had automatically terminated for failure to file a Form 489 completion notification. On January 3, 1994, Emery filed eight separate Special Temporary Authority (STAs) to continue operation while waiting for reinstatement due to their allowing the construction permits to lapse. The STAs were granted on January 10, 1994.

3. In each NALF, the Chief, Mobile Services Division (MSD) found that because Emery commenced operation without timely filing FCC Form 489, it was in apparent violation of Section 22.9(b)(1) of the Commission's Rules,[1] and that Emery's failure to file the FCC Form on time constituted willful and repeated conduct within the terms of Section 503(b) of the Communications Act. Moreover, in each NALF, the MSD stated that pursuant to the Commission's *Policy Statement* on Forfeitures then in effect,[2] the base forfeiture amount for failing to file required forms was $20,000 each, but the MSD, however, adjusted the forfeiture downward by $10,000 because the violation was a relatively minor one and by an additional $6,000 because Emery voluntarily disclosed its failures to file the FCC Form 489s. As a result, the MSD assessed a $4,000 forfeiture in each NALF.

[1] Section 22.9(b)(1) of the Commission's Rules states:

> *Notification of status of facilities.* (FCC Form 489). When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

[2] Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993) (*1991 Forfeiture Policy Statement*).

III. DISCUSSION

4. Emery claims that it timely built the facilities, but its failure to file a timely FCC Form 489 for those locations was an "innocent misunderstanding of the Commission's requirements." It claims that it filed its eight applications with a view of establishing a Basic Exchange Telecommunications Radio Service (BETRS) which would be one integrated system, requiring only one filing of a form 489. It asserts that when the oversight was discovered, it sought assistance from the National Telephone Cooperative Association (NCTA) to prepare the necessary notification and reinstatement applications immediately, making full disclosure to the Commission of the inadvertent failure to file the Form 489s.

5. Emery asserts that, prior to issuance of the eight NALFs, it had not been cited for any violations of the Commission's rules. Accordingly, Emery submits that it has a history of prior compliance with the Commission's Rules which should have been taken into consideration, along with its lack of culpability. Emery adds that the *Forfeiture Policy* should not have been applied in this case, because the day before seven of the NALFs were adopted, July 12, 1994, the *Policy Statement* was vacated by the U.S. Court of Appeals. Emery further argues that a penalty of $32,000 is so high that it could force Emery to reconsider whether to continue providing its services, which it believes are vital to its BETRS subscribers, since many of them rely on their radio telephones for daily communications. These people might go unserved if Emery does not perform the services.

6. There is no dispute that Emery failed to timely file the eight FCC Form 489s as required. Nonetheless, we accept its contention that the forfeiture should be adjusted downward for its "history of overall compliance" because Commission files do not contradict Emery's assertion of such history. Importantly, also, we note that in assessing the forfeiture amount of $4,000, the Bureau followed the forfeiture guidelines established in the Commission's *1991 Forfeiture Policy Statement*. However, as Emery pointed out, on July 12, 1994, the U.S. Court of Appeals for the D.C. Circuit vacated the forfeiture guidelines in *United States Telephone Ass'n v. FCC*, 28 F.3d 1232 (D.C. Cir.1994). Therefore, the Commission has reassessed the forfeiture amount pursuant to the statutory guidelines set forth in Section 503 of the Act, 47 U.S.C.§503(b)(2)(D). In particular, Section 503(b) of the Act requires that the Commission "take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require." 47 U.S.C. §503(b)(2)(D). In the somewhat recent case, *AllCity Paging, Inc.*, 9 FCC Record 6485 (1994), the Commission found that for each violation of failing to file the form 489 (§22.9(b)(1)) of the Rules), a forfeiture of $2,000 was warranted. Considering the above factors, and the *AllCity* case, we find that a forfeiture of $2,000, for each failure to file a form 489, is appropriate in this case as well. However, due to the fact that Emery voluntarily disclosed its failure to file six of the eight form 489s (*see*, para. 2, *supra)*, and that it did file those forms as soon as it realized its mistake, we hereby reduce those six forfeitures to $1,000 as we did in *AllCity*, for a total of $4,000 plus $6,000, or $10,000.

IV. CONCLUSION AND ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the Consolidated Request for Rescission or Reduction filed by Emery Telephone in the captioned proceeding IS GRANTED to the extent noted above and in other respects is DENIED.

8. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. § 503(b), and Section 1.80(f)(4) of the Commission's Rules, 47 C.F.R. § 1.80(f)(4), that Emery Telephone SHALL FORFEIT to the United States the sum of ten thousand dollars ($10,000) for violations of Section 22.11(b) of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission, payable to the order of the Federal Communications Commission, within thirty (30) days from the date of this Order, to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

9. IT IS FURTHER ORDERED that if the forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act of 1934, 47 U.S.C. § 504(a).

10. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Emery Telephone by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Howard Davenport
Chief, Enforcement Division
Wireless Telecommunications Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

TeleCourier Communications Corporation — File No. 416MS0002

Notice of Apparent Liability for Forfeiture for Stations KSA746 and KRM966 in the Public Land Mobile Service at Bloomington, Illinois

MEMORANDUM OPINION AND ORDER

Adopted: September 11, 1995; Released: September 15, 1995

By the Wireless Telecommunications Bureau Enforcement Division

I. INTRODUCTION

1. Tele Courier Communications Corporation (Telecourier) has filed a Response to the Notice of Apparent Liability for Forfeiture (*NALF*) released on April 6, 1994. *See TeleCourier Communications Corporation,* 9 FCC Rcd 1736 (1994). Respondent sets forth in its pleading several arguments in support of its request for cancellation or reduction of the forfeiture. For the reasons stated below, we affirm our finding of liability, but reduce the forfeiture amount from $3,500 to $2,500 on our own motion.

II. BACKGROUND

2. On July 28, 1993, Telecourier filed an application for Commission consent to the transfer of control from the Shareholders of Telecourier to David J. and Kristyne Segneri. Apparently, prior to March 8, 1989, the two Segneris, and Edward and Louise Saari each held 25% of Telecourier's voting stock. As a result of the transfer on March 8, 1989, in which the Saaris sold their stock in Telecourier back to Telecourier, David and Kristyne Segneri then each owned 50% of its voting stock. Before and after the stock transfer, David Segneri had actual, *de facto,* control of Telecourier. The parties claim that they were unaware of the need to get prior Commission authority regarding their stock transfer.

3. As set forth in the *NALF,* the March 8, 1989, stock transfer constituted an unauthorized *pro forma* transfer of control because a 50% interest in TeleCourier was transferred without Commission approval. As a result, the *NALF* found that Telecourier violated §310(d) of the Telecommunications Act and §22.39 of the Commission Rules which pertain to transfers of control, and that the unauthorized transfer constituted willful and repeated conduct within the terms of Section 503(b) of the Communications Act (Act). Consequently, the *NALF* assessed a $3,500 forfeiture pursuant to the Policy Statement then in effect.[1]

III. RESPONSE TO NALF

4. Respondent asserts that the NALF did not establish a violation of the Communication Act because there was no *pro forma* transfer of control, and that §22.39(a) of the Commission Rules is null and void, because it exceeds the Commission's scope of authority granted by Congress. Also, the Commission failed to consider two things: one, that the violation, if any, was minor; and two, that Telecourier has an excellent history of regulatory compliance as a licensee. Finally, Telecourier points out that the *Policy Statement* the Commission used in assessing the amount of the forfeiture has been challenged in the U.S. District Court of Appeals, and thus should not have been used.

IV. DISCUSSION

5. Respondent's assertions concerning the impropriety of the NALF are misplaced. First, contrary to Telecourier, the transfer of stock to the Segneris *did* constitute a *pro forma* transfer of control. Even though David Segneri may have maintained actual control of Telecourier both before *and* after the stock transfer, it is clear from the facts given that the stock transfer from the Saaris to Telecourier (and thus to the Segneris) constituted a transfer of control, because a 50% interest in TeleCourier was transferred without prior Commission approval, which constituted a violation of the Act. In fact, §309(c)(2)(B) of the Act recognizes that a transfer involving even an insubstantial change in ownership or control requires prior Commission approval. *See, Hinton Telephone Co., of Hinton, Oklahoma, Inc.,* 7 FCC Rcd 6643 (1992).

6. Second, Telecourier's argument that the Rule, §22.39, exceeds the Commission's authority because it is more restrictive than the statute, at §310(d) of the Act, is flawed. The relevant, plain language of Section 310(d) is that:

> No... station license... shall be transferred... in any manner... to any person... except upon application to the Commission...

This language is very restrictive; § 22.39(a) of the Rules merely provides:

> (a)(1) A change from less than 50% ownership to 50% or more ownership shall always be considered a transfer of control.

This is implementing language which gives the FCC's interpretation as to when there has been a transfer of a license under §310(d) of the Act. It does not purport to be, nor is it in actuality, more restrictive than the statute itself.

7. Next, we disagree with Telecourier's characterizing its violation as minor. The fact remains that Telecourier effected a transfer of control and, in so doing, failed to comply with the Commission's rules. Thus, a violation

[1] *Policy Statement, Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991), *recon. denied,* 7 FCC Rcd 5339 (1992), *revised,* 8 FCC Rcd 6215 (1993) (*1991 Forfeiture Policy Statement*).

occurred, and a forfeiture is appropriate. As to the inapplicability of the *Policy Statement* in assessing the forfeiture amount, the Commission properly followed the forfeiture guidelines established in the Commission's 1993 Forfeiture Policy Statement when it issued the NALF on April 6, 1994 for $3,500. However, soon after that, on July 12, 1994, the U.S. Court of Appeals for the D.C. Circuit vacated the forfeiture guidelines. *See, United States Telephone Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir.1994).* Therefore, on reconsideration, the Commission has reassessed the amount pursuant to the statutory guidelines set forth in Section 503 of the Act, 47 U.S.C.§503(b)(2)(D). In particular, Section 503(b) of the Act requires that the Commission "take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require." 47 U.S.C. §503(b)(2)(D). Furthermore, in this case, we see that the offense, failure to obtain FCC approval, is somewhat similar to the offense in the recent case, *AllCity Paging, Inc.*, 9 FCC Record 6485 (1994), where the Commission found that for each violation of failing to secure Commission authorization, a forfeiture of $3,500 was warranted. Considering the above factors, and the *AllCity* case, we find that a forfeiture of $3,500, for the failure to secure Commission approval, is appropriate in this case as well. Therefore, we are imposing a forfeiture on Telecourier at $3,500. However, because Telecourier voluntarily disclosed its failure to seek FCC approval, and because it has a history of overall compliance with the Commission, we reduce the forfeiture to $2,500.

V. CONCLUSION

8. We conclude for the reasons set forth above that there is no basis upon which to grant Telecourier's arguments. Nonetheless, on our own motion we are reducing the amount to $2,500 as reflective of the statutory guidelines set out in the Act at 47 U.S.C. §503(b)(2)(D).

VI. ORDEIRNG PARAGRAPHS

9. Accordingly, IT IS ORDERED that the request for cancellation of the NALF filed by Telecourier in the above-captioned proceeding IS DENIED.

10. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that TeleCourier Communications Corporation SHALL FORFEIT to the United States the sum of two thousand five hundred dollars ($2,500) for violation of the aforesaid statutory and rule provisions. Payment of the forfeiture may be made by mailing a check or similar instrument, noting the above-captioned file number on its payment, to the Commission within thirty (30) days of the release date of this Order, payable to the order of the Federal Communications Commission, at: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

11. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act of 1934, 47 U.S.C. § 504(a).

12. IT IS FURTHER ORDERED that a copy of this Order BE SENT to TeleCourier Communications Corporation, by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Howard Davenport
Chief, Enforcement Division
Wireless Telecommunications Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

USA Mobile Communications, Inc., II — File No. 216MS0005

Notice of Apparent Liability for Forfeiture Penalty for Station KWU442 in the Public Land Mobile Service at North Ridgeville, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: September 11, 1995; Released: September 15, 1995

By the Wireless Telecommunications Bureau Enforcement Division

I. INTRODUCTION

1. USA Mobile Communications, Inc. II (USA Mobile) has filed a Response to the Notice of Apparent Liability for Forfeiture (*NALF)* released on September 29, 1993. *See USA Mobile Communications, Inc. II*, 8 FCC Rcd 7090 (1993). Respondents set forth in their pleading several arguments in support of their request for remission of or, alternatively, a substantial reduction in the forfeiture. For the reasons stated below, we affirm our finding of liability, but reduce the forfeiture amount from $20,000 to $3,000 on our own motion.

II. BACKGROUND

2. USA Mobile acquired Station KWU442 in 1988. At that time, FCC had authorized the Station to operate a facility on 158.70 MHZ at Northridge, Ohio, which is above Line A. In the summer, 1992, the owner of the tower informed USA Mobile it was constructing a new tower and dismantling the old tower. The new tower would have the same address as the old tower, but the location was moved 0.3 miles away. According to USA Mobile, it made the determination that this facility relocation would not increase the reliable service area contour or the Carey interference contour of the previously authorized facility. Also, because USA Mobile believed that it was merely relocating existing facilities to a new tower at the same address, it determined that it must notify the Commission one of two ways; either it should correct the tower coordinates, or it should notify the Commission of a modification to its base station facilities, since there was no increase in the reliable service contour. Both changes require FCC notification by filing a Form 489, so when USA Mobile filed the form it noted that it was filing a permissive modification (relocation), pursuant to §22.9(d)(6) of the Commission's Rules. As set forth in the *NALF*, because the station was located above Line A (as defined in Section 1.955(e) of the Commission's Rules, 47 C.F.R. § 1.955(e)), frequency coordination of this station with Canada was required prior to construction and operation. USA Mobile, however, did not perform the required coordination. The *NALF* found that because prior Commission approval was required due to the Line A coordination obligation, USA Mobile's filing of FCC Form 489 did not authorize its operation of the transmitter. Because USA Mobile did not receive the necessary FCC authorization before moving its facilities, the NALF concluded that USA Mobile committed an apparent violation of Section 301 of the Communications Act and Sections 22.3 and 22.117 of the Commission's Rules. The *NALF* determined that USA Mobile had been operating the station without authorization, and that operation constituted willful and repeated conduct within the terms of Section 503(b) of the Communications Act. Consequently, the *NALF* assessed a $20,000 forfeiture pursuant to the Policy Statement then in effect.[1]

III. RESPONSE TO NALF

3. USA Mobile asserts that since it was merely relocating existing facilities to a new tower at the same address, such a relocation was permissive under §22.9(d)(6). Moreover, since the language of the rule which the FCC stated was violated, §22.117(b), refers to requirements imposed on the installation of additional transmitters (and not relocated ones), USA Mobile believed the rule was not applicable in its circumstances. It argues that FCC's interpretation of the rule reveals that the rule is unclear, and therefore, the forfeiture must be rescinded. Alternatively, USA Mobile claimed that the Policy Statement (then in effect) calls for a downward adjustment in circumstances where, as with USA Mobile, there is good faith in attempting compliance with the Commission rules, and a history of overall compliance.

IV. DISCUSSION

4. There is no dispute that the location of the facilities is above Line A, and, therefore, USA Mobile's filing of FCC Form 489 did not authorize its relocation. Regardless of USA Mobile's claim that it exercised due diligence, the fact remains that USA Mobile relocated its station's facilities above Line A and was on a frequency for which coordination with Canada was required. Since USA Mobile did not seek prior approval from the Commission by filing the necessary Form 401 before the relocation, it violated the Commission's Rules at §§22.3, 22.117, and §301 of the Act.

5. We note that in assessing the forfeiture amount of $20,000, the Bureau followed the forfeiture guidelines established in the Commissions 1991 Forfeiture Policy Statement. However, on July 12, 1994, the U.S. Court of Appeals for the D.C. Circuit vacated the forfeiture guidelines. *See, United States Telephone Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir.1994).* Therefore, on reconsideration, the Commission has reassessed the amount pursuant to the statutory guidelines set forth in Section 503 of the Act, 47 U.S.C.§503(b)(2)(D). In particular, Section 503(b) of the

[1] *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993) (*1991 Forfeiture Policy Statement).*

Act requires that the Commission "take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require." 47 U.S.C. §503(b)(2)(D). In this case, we see that the offense, failure to obtain FCC authorization, is somewhat similar to the offense in the recent case, *AllCity Paging, Inc.*, 9 FCC Record 6485 (1994), wherein the Commission found that for each violation of failing to secure Commission authorization, a forfeiture of $3,500 was warranted. Considering the above factors, the *AllCity* case, and the added fact that this case involved a violation of Section 22.117, operation of a facility above Line A in Canada, we find that a forfeiture of $5,000 is appropriate. However, due to the fact that USA Mobile has a history of overall compliance with the Commission rules, we are reducing the forfeiture imposed upon USA Mobile to $3,000.

V. CONCLUSION

6. We conclude for the reasons set forth above that there is no basis upon which to grant respondents' request to cancel the forfeiture. Nonetheless, on our own motion we are reducing the amount to $3,000 as reflective of the statutory guidelines set out in the Act at 47 U.S.C. §503(b)(2)(D).

VI. ORDERING PARAGRAPHS

7. Accordingly, IT IS ORDERED that the Response in the above-captioned proceeding, filed by USA Mobile Communications, Inc. II IS DENIED.

8. IT IS FURTHER ORDERED that the forfeiture IS REDUCED to $3,000.

9. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that USA Mobile Communications Inc. II SHALL FORFEIT to the United States the sum of three thousand dollars ($3,000) for violation of the aforementioned statutory and rule provisions. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission, payable to the order of the Federal Communications Commission, within thirty (30) days from the date of this Order, to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

10. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act of 1934, 47 U.S.C. § 504(a).

11. IT IS FURTHER ORDERED that a copy of this Order BE SENT to USA Mobile Communications Inc. II by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Howard Davenport
Chief, Enforcement Division
Wireless Telecommunications Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Shasta-Cascade Services, Inc. File No. 316MS0031

Notice of Apparent Liability for Forfeiture Penalty for Station KNKL908 in the Public Land Mobile Service at Yreka, California

MEMORANDUM OPINION AND ORDER

Adopted: September 11, 1995; Released: September 15, 1995

By the Chief, Enforcement Division: Wireless Telecommunications Bureau

I. INTRODUCTION

1. Shasta Cascade Services, Inc. (Shasta) has filed a Request for Rescission or Reduction of the "Notice of Apparent Liability for Forfeiture" issued by the Chief, Mobile Services Division (MSD) for $10,000. *Shasta-Cascade Services, Inc.*, 8 FCC Rcd 1177 (Mobile Serv. Div. 1993) (*NALF*). For the reasons discussed below, the request is granted.

II. BACKGROUND

2. On June 19, 1991, the Commission granted a developmental authorization to Shasta to operate on frequency 158.10 MHz at Yreka, California. On June 15, 1992, the Commission issued a letter to Shasta setting forth the conditions of its developmental grant. One condition was that Shasta was required to conduct field strength measurements to demonstrate that harmful electrical interference would not be caused to co-channel operations. These measurements were to be performed quarterly and submitted in reports within one year of commencement of operation in order for Shasta to apply for a permanent authorization. Shasta timely filed one report on June 18, 1993, but did not file the other three required reports in a timely fashion.

3. In the *NALF*, the MSD found that because Shasta did not take the required measurements to obtain the requested information for the four quarterly reports required by the Commission, it did not comply with the conditions and requirements of its developmental authorization, and thus Shasta was in violation of §22.404(b) and §22.406(a) of the Commission's rules. In addition, failure to file the reports in a timely fashion constituted willful and repeated conduct within the terms of Section 503(b) of the Communications Act. In arriving at the $10,000 forfeiture amount, the MSD followed the Commission's *Policy Statement* on Forfeitures then in effect,[1] utilizing the base forfeiture amount for the violation without applying any adjustment factors.

III. DISCUSSION

4. Shasta was aware of the conditions on its authorization, and does not dispute that it filed only one of four required developmental reports in a timely fashion. Shasta argues in its Request that it is a small company, with only eight employees, and it is struggling to turn a profit. To pay a forfeiture of that amount would be a substantial financial hardship, which could lead to its dissolution. It currently performs vital paging services to its customers, many of whom are medical, security and emergency personnel who might go unserved if Shasta does not perform the services. Moreover, Shasta adds, it made voluntary disclosure of the fact that it had not filed three of its developmental reports on time, and it filed two of the three remaining reports before the October, 1993, NALF was issued. Additionally, Shasta claims to have had many difficulties in gathering the necessary information due to severe weather conditions and personnel problems. Then, on June 28, 1994, Counsel for Shasta informed the Commission that Shasta's 100% owner, Jeanne Crab, upon whose control the company entirely depended, passed away.

5. Finally, Shasta contends that, prior to issuance of the NALF, Shasta had not been cited for any violation of the Commission's Rules and, thus, Shasta has a history of overall compliance which should have been taken into consideration. Thus, it states, if a forfeiture must be imposed, it should be nominal.

6. There is no dispute that Shasta failed to timely file the necessary information, and, therefore, its culpability, albeit the result of many factors, nonetheless was present. After issuance of the *NALF* and the filing of Shasta's Response, however, the *Policy Statement* was vacated on July 12, 1994, by the U.S. Court of Appeals for the D.C. Circuit in *United States Telephone Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir.1994)*. Due to this decision, the Commission has reassessed the forfeiture amount pursuant to the statutory guidelines set forth in Section 503 of the Act, 47 U.S.C.§503(b)(2)(D). In particular, Section 503(b) of the Act requires that the Commission "take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require." 47 U.S.C. §503(b)(2)(D). In this case, we see that the offense, failure to file the requested information is somewhat analogous to failure to file FCC Form 489, *Notification of status of facilities*, the violation noted in the recent case, *AllCity Paging, Inc.*, 9 FCC Record 6485 (1994). There, the Commission found that for each violation of failing to file the form 489 (§22.9(b)(1) of the Rules), a forfeiture of $2,000 was warranted. Considering the above factors, and the *AllCity* case, we find that a forfeiture of $2,000, for the failure to file the requested information, is appropriate in this case as well.

[1] Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993).

However, due to the fact that Shasta voluntarily disclosed its failure to file the information, that it quickly took remedial action, and that it has a history of overall compliance with the Commission, we reduce the forfeiture to $1,000 as we did in *AllCity*. Then, considering these particular factors, and the fact that the administrative costs of pursuing a forfeiture could well exceed the benefits to the Commission for a company such as Shasta,[2] we have determined it to be in the best interests of the Commission to dismiss the case against Shasta altogether.

IV. CONCLUSION AND ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the Request for Dismissal or Forfeiture Reduction filed by Shasta in the captioned proceeding IS GRANTED.

8. IT IS FURTHER ORDERED that the Notice of Apparent Liability issued to Shasta IS DISMISSED.

9. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Shasta-Cascade Services, Inc., in care of Lee J. Peltzman, Counsel, Shainis & Peltzman,1255 23rd Street, N.W., Suite 500, Washington, DC 20037, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Howard Davenport
Chief, Enforcement Division
Wireless Telecommunications Bureau

[2] Due to the Commission's reduction of the forfeiture, it is not necessary to address Shasta's "inability to pay" argument.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

FirstPAGE USA of Virginia, Inc. File No. WB/ENF-I-95-0534

Notice of Apparent Liability for Forfeiture for Stations KNKJ998 and/or KNKL823 in the Paging and Radiotelephone Service at, collectively, various locations in New Jersey.

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: September 11, 1995; Released: September 15, 1995

By the Enforcement Division:

1. FirstPAGE USA of Virginia, Inc. ("FirstPAGE") has informed the Commission that a system audit recently conducted by it disclosed numerous instances in which modifications to its paging facilities were made without filing the required FCC Forms 489.[1] FirstPAGE states that the required forms have now been filed.[2]

2. FirstPAGE states in its letter that it identified four instances in which FCC Forms 489 were not filed, in violation of the Commission's Rules.[3] These four incidents involved modifications to antenna locations including the implementation of fill-in facilities. FirstPAGE states that all of the instances in which it failed to file required forms were not intentional.

3. Section 22.142(b) of the Commission's Rules, 47 C.F.R. § 22.142(b), provides, in pertinent part:

> *Notification requirement.* Licensees must notify the Commission (FCC Form 489) of commencement of service to subscribers. The notification must be mailed or delivered to the filing place (see § 22.106 of this part) no later than 15 days after service begins.

There is no dispute that FirstPAGE failed to file the required FCC Forms 489 in each of the four instances noted above. Consequently, FirstPAGE appears to have violated Section 22.142(b) of the Commission's Rules.

4. Section 503(b) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 503(b), states, in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have --
>
> (B) ... willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act ... shall be liable to the United States for a forfeiture penalty.

We find that FirstPAGE's failure to file FCC Forms 489 in the four instances noted above constitute willful and repeated conduct within the terms of the statute.[4]

5. Based upon our review of the nature and number of FirstPAGE's violations, we reach the following conclusion. For each violation of Section 22.142(b) involving a failure to file FCC Form 489, we find that a forfeiture of $2,000 per violation is warranted. Thus, the total forfeiture would be $8,000. In view of the fact that FirstPAGE voluntarily disclosed the violations, and the infractions themselves were quite minor, we reduce the total forfeiture to $4,000.

6. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, FirstPAGE USA of Virginia, Inc., IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of four thousand dollars ($4,000) for willful and repeated violations of the aforementioned rule provisions. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

7. Payment of the forfeiture may be made by credit card or by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the File Number of the above-captioned proceeding.

8. A copy of the Notice is being sent to FirstPAGE USA of Virginia, Inc. by Certified Mail, Return Receipt Requested.

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[1] *See* Letter to J. Cimko, Chief, Mobile Services Division, from P. Besozzi, counsel for FirstPAGE (November 30, 1994).

[2] *Id.*

[3] *See* Section 22.142(b) of the Commission's Rules, 47 C.F.R. § 22.142(b).

[4] Section 312(f)(1) of the Act provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

This definition applies to Section 503(b) of the Act. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991). Section 312(f)(2) of the Act provides:

> The term "repeated", when used with reference to the comission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

This definition also applies to Section 503(b) of the Act. *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 50-51 (1982).

FEDERAL COMMUNICATIONS COMMISSION

Howard C. Davenport
Chief, Enforcement Division
Wireless Telecommunications Bureau

Before the
Federal Communications Commission
Washington, D. C. 20554

In the Matter of

CUID Nos. NJ0001, Absecon;
NJ0005, Somers Point;
NJ0030, Ocean City

Sammons Communications, Inc.

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: March 22, 1995; Released: March 24, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities designated above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period

[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Opeartor implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in Operator's prices for the period after May 14, 1994 may be required to reflect the fact that Operator's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on Operator and received by the Commission on the dates set forth on Appendix A. Operator filed FCC Form 393 in response; Operator also filed amended FCC Forms 393 on June 24, 1994 and supplemental filings on February 6, 1995.[11]

5. For each of the franchise areas, Operator calculated a maximum permitted CPS rate that was lower than what Operator was actually charging for its CPS tier. Thus, Operator has failed to show that its rates for the CPS tier were not unreasonable. Furthermore, upon review of Operator's Form 393 filings, we have found that it has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. On Worksheet 2, Line 202, Operator claimed that it provided a total of 36 rate-regulated channels on September 30, 1992.[12] In response to our December 29, 1994 Public Notice, Operator submitted additional information stating that it provided only 35 channels on September 30, 1992. Operator's 1992 channel line-up cards verify a total channel count of 35. Therefore, we adjusted Line 202 to reflect 35 channels, which in turn affected Line 206. The benchmark calculation reported on Line 220 was also recomputed on the basis of 35 rate-regulated channels. This adjustment increased the benchmark channel rate entered on Line 220 of Worksheet 2.

b. Operator miscalculated the Inflation Adjustment Factor (Form 393, Part II, Worksheet 1, Line 127). For NJ0005 and NJ0030, using the Gross National Product-Price Index figures published by the Department of Commerce on July 29, 1994, we calculate 1.030 as the Inflation Adjustment Factor through October 31, 1993, the latest date through which Operator could claim inflation for each of these franchise areas. For NJ0001, we calculate 1.032 as the Inflation Adjustment Factor through November 30, 1993, the latest date through which Operator could claim inflation for this franchise area.[13]

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rates it was charging during the periods in question. Operator's showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[14]

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[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994). Operator submitted additional information in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings. Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994) and Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 95-87 (Jan. 20, 1995) (together, *Public Notice*).

[12] At that time, all of Operator's rate-regulated channels were on the basic service tier.

[13] *See* Instructions to FCC Form 393, page 11, Line 124 (inflation adjustment is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form"); 47 C.F.R. § 76.956(a) (operator must file a rate justification within 30 days of service of a complaint that is not returned by the Commission).

[14] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operator in the areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the communities shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[15] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

12. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Operator shall not be required to obtain advance approval of adjustments to its CPS prices in the franchise areas addressed herein for one year following the release of this Order, due to Operator's having submitted in good faith optional supplemental filings in response to our *Public Notice*.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
NJ0001	11/04/93	11/02/93
NJ0005	10/29/93	10/25/93
NJ0030	11/02/93	10/28/93

Appendix B

CUID No.	Actual Rate	Maximum Permitted Rate
NJ0001	$11.13	$9.53
NJ0005	$11.13	$9.53
NJ0030	$11.13	$10.16

[15] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D. C. 20554

In the Matter of

TELESAT CABLEVISION, INC.

Petition for Reconsideration
of Certification of the
City of Leesburg, Florida (FL0997)

MEMORANDUM OPINION AND ORDER

Adopted: March 9, 1995; Released: March 10, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 16, 1993, Telesat Cablevision, Inc. ("Telesat") filed a timely Petition for Reconsideration of Certification challenging the certification of the City of Leesburg, Florida to regulate the system's basic service rates in Leesburg, Florida.[1] The City of Leesburg did not file an opposition to Telesat's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[3] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[5] Regulation of rates is automatically stayed pending review of a timely filed petition for reconsideration alleging the presence of effective competition.[6]

II. DISCUSSION

3. Telesat argues that its system in the City of Leesburg is exempt from regulation because it is not a cable system as defined under the 1992 Cable Act. Specifically, Telesat states that its Leesburg system is considered a satellite master antenna television system (SMATV) in that it serves a single private multiple unit dwelling known as Royal Oak Estates, and that it does not make use of any public right-of-ways. As supporting documentation, Telesat provides a sworn affidavit from a responsible company official certifying to the facts in the petition.[7]

---

[1] The City of Leesburg filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328"), on October 14, 1993. The certification became effective on November 13, 1993.

[2] Communications Act of 1934 § 623(a)(4); 47 U.S.C. § 543(a)(4).

[3] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] Affidavit of Douglas Grace, Chief Engineer of Telesat Cablevision, Inc. dated November 8, 1993. Mr. Grace states that the Leesburg system serves a total of 64 subscribers, and that the system serves a private community known as the Royal Oaks Estates, a commonly-owned multiple unit dwelling. Further, Mr. Grace states that the system does not make use of any public right-of-ways. We also note that in a June 29, 1993, transmittal letter accompanying the system's 1993 Basic Signal Leakage Performance Report (FCC Form 320), Telesat notified the Commission of its SMATV status and requested that the Commission "unregister" [sic] the system since it did not meet the Commission's definition of a

4. The Communications Act of 1934, as amended,[8] and the Commission's rules[9] provide that only the rates of "cable systems" that are not subject to effective competition may be regulated. The Communications Act of 1934[10] and the Commission's rules[11] further provide that "the term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." However, "such term does not include a facility that serves only subscribers in one or more multiple unit dwellings under common ownership, control or management, unless such facility or facilities uses any public right-of-way."[12]

5. Based on the evidence presented, we find that Telesat has submitted sufficient evidence demonstrating that it is not a cable system as defined by the Communications Act or the Commission's rules. As such, it is not subject to rate regulation. Accordingly, we grant its petition.

III. ORDERING CLAUSES

6. Accordingly, **IT IS ORDERED** that the Petition for Reconsideration filed by Telesat Cablevision, Inc. challenging the certification of the City of Leesburg, FL to regulate Telesat's rates **IS GRANTED.**

7. **IT IS FURTHER ORDERED** that the certification of the City of Leesburg to regulate Telesat Cablevision's basic cable service rates **IS RESCINDED.**[13]

8. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

"cable system." Section 76.12 of the Commission's Rules requires cable systems to file a registration statement with the Commission. *See* 47 C.F.R. § 76.12. This requirement does not apply to entities which are not cable systems. As a result of Telesat's June 29, 1993 transmittal letter the Commission discontinued the system's registration as a cable system.

[8] Communications Act of 1934, § 623(a)(2), 47 U.S.C. § 543(a)(2).

[9] 47 C.F.R. § 76.905(a).

[10] Communications Act of 1934 § 602(7), 47 U.S.C. § 522(7).

[11] 47 C.F.R. § 76.5(a).

[12] Communications Act of 1934 § 602(7)(B), 47 U.S.C. § 522(7)(B); 47 C.F.R. § 76.5(a)(2).

[13] Our action here has no effect on the City's ability to regulate the basic cable service rates of Lake County Cablevision, the other operator for which the City sought certification.

Before the
Federal Communications Commission
Washington, D. C. 20554

In the Matter of

CUID Nos. OH0109 and OH0695

V Cable, Inc.
Euclid and Cleveland Heights, Ohio

Benchmark Filings To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: March 14, 1995 Released: March 15, 1995

By the Chief, Cable Services Bureau:

Introduction

1. Here we consider complaints about the prices V Cable, Inc. d/b/a Cablevision ("Cablevision") was charging for its cable programming service ("CPS") tier in Euclid, Ohio, CUID No. OH0109, and Cleveland Heights, Ohio, CUID No. OH0695. Cablevision has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Cablevision's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing,

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Cablevision has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Cablevision implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in Cablevision's prices for the period after May 14, 1994 may be required to reflect the fact that Cablevision's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

operators must use the FCC Form 1200 series.[10]

Procedural Matters

4. The first complete and timely CPS complaint in Euclid, Ohio, CUID No. OH0109, was completed and served on Cablevision on December 14, 1993 and received by the Commission on December 20, 1993. The first complete and timely CPS complaint in Cleveland Heights, Ohio, CUID No. OH0695, was completed and served on Cablevision on October 13, 1993 and received by the Commission on October 18, 1993.

5. Cablevision filed its FCC Form 393 for Euclid, Ohio, CUID No. OH0109, on January 14, 1994, and filed its Form 393 for Cleveland Heights, Ohio, CUID No. OH0695, on November 30, 1993. Cablevision amended its justification for CUID No. OH0109 on June 24, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[11] Cablevision further amended its justification in CUID No. OH0109 on February 17, 1995, in response to a Commission letter which requested further clarification of Cablevision's amended showing.[12]

Background

6. Cablevision restructured its rates in an effort to comply with the Commission's Rules on September 1, 1993. In October 1993, Cablevision changed its channel line-up on Channel 37 by deleting HSN II, a satellite channel on the CPS tier, and adding WQHS, a non-satellite channel on the basic tier. On January 1, 1994, Cablevision again changed its channel line-up by moving Channel 17, a satellite channel on the CPS tier, to the basic tier. These changes in Cablevision's channel line-up were unaccompanied by any change in Cablevision's prices for its basic and CPS tiers. Cablevision completed Part II of Form 393 using its channel line-up as of October 1993. In Part I of Form 393, Cablevision performed alternative calculations using its number of channels as of September 1, 1993, and as of October 1993.

Discussion

7. Cablevision acknowledges that its CPS prices are higher than the maximum permitted price if Form 393 is calculated using the number of channels Cablevision offered as of October 1993.[13] Thus, Cablevision has failed to demonstrate that its prices for the CPS tier were not unreasonable. Furthermore, upon review of Cablevision's Form 393 filings, we have found that Cablevision has not correctly calculated its maximum permitted price as of the initial date of regulation, and it is therefore appropriate to make the following adjustments to Cablevision's calculations in Form 393:

a. In its Form 393 filings, Cablevision's calculations for its rate-regulated package as of the initial date of regulation (Form 393, Part II, Worksheet 1 and Form 393, Part I) do not count Channel 30 as a regulated satellite channel. Similarly, Cablevision's calculations for its rate-regulated tiers as of September 30, 1992 (Form 393, Part II, Worksheet 2) do not count Channel 29 as a regulated satellite channel. However, according to the channel line-ups included with Cablevision's responses to complaints and the February 17, 1995 letter provided by Cablevision,[14] as of the initial date of regulation Channel 30 carried Bravo, which is a non-rate-regulated pay-per-channel service, for 76 hours per week and carried C-Span II, which is a rate-regulated satellite service offered on the CPS tier, for 92 hours per week. The same programming in the same proportion was carried on Channel 29 as of September 30, 1992.

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[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] Letter from Peter G. Wolfe, FCC, to Chad G. Hume, Cablevision (Feb. 13, 1995).

[13] Cablevision asserts that when it initially restructured its monthly CPS tier prices on September 1, 1993, it had one additional CPS channel and one fewer basic tier channel. If Cablevision had computed Part I of Form 393 based on the number of channels offered on September 1, 1993, its prices would have been equal to or lower than the maximum permitted per-channel charge as calculated in the filings. However, as recognized by Cablevision, Form 393 must be completed using the number of channels offered by the operator as of the initial date of regulation.

[14] Letter from Chad G. Hume, Cablevision, to Peter G. Wolfe, FCC (Feb. 17, 1995).

b. Our policy on "split" channels is to categorize them according to their preponderance of use. This policy is based on the fact that the 1992 price survey underlying the benchmark system was analyzed based on whole, not fractional, channel counts. Under the benchmark system in effect prior to May 15, 1994, all channels must be characterized as either rate-regulated or not subject to rate regulation and as either satellite or non-satellite. A "channel" is defined as a "unit of cable service identified and selected by a channel number or similar designation." FCC Form 393, p. 10. The preponderance-of-use test is the only one consistent with this conceptual framework.[15]

c. Under our rules, pay channels may not be counted as regulated channels or as satellite channels.[16] However, under the preponderance-of-use test, the channel that was split between Bravo and C-Span II is not a pay channel because it was used for a rate-regulated service the majority of the programming week. We therefore increase the number of satellite channels used in calculating the benchmark on Form 393, Part II, Worksheet 2, Line 220 from 22 to 23 and increase the number of total regulated channels in the same calculation from 32 to 33. We also increase the number of channels on Form 393, Part II, Worksheet 2, Line 202 from 32 to 33. On Form 393, Part II, Worksheet 1, Line 121, we increase the numbers of satellite and regulated channels used to calculate the benchmark from 21 to 22 and from 31 to 32, respectively. Finally, we increase the number of channels in the CPS tier on Form 393, Part I and on Form 393, Part II, Worksheet 1, Line 102, from 21 to 22. These adjustments have the net effect of reducing the benchmark channel rates entered on Line 121 of Worksheet 1 and Line 220 of Worksheet 2, reducing the base rate per channel on Worksheet 1, Line 110 and Worksheet 2, Line 210, and increasing the number of channels used to calculate the maximum permitted CPS rate in Part I.

8. Because Cablevision has failed to demonstrate that its prices for the CPS tier were not unreasonable, we will set prices for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the dates for which Cablevision filed Form 393 in each franchise area.[17] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992, 125.7 for the third quarter of 1993, and 126.2 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate 1.034 as the Inflation Adjustment Factor through December 1993, the base date Cablevision used in justifying its rate for CUID No. OH0109, and 1.028 as the Inflation Adjustment Factor through September 1993, the base date Cablevision used in justifying its rate for CUID No. OH0695.

9. These adjustments have the cumulative effect of yielding the maximum permitted monthly CPS tier price for each franchise area as of the initial date of regulation set forth in Appendix A.

10. As described in paragraph 6, *supra*, on January 1, 1994, Cablevision moved Channel 17 from the CPS tier to the basic tier. Cablevision thus increased the rate charged for its service by reducing the number of channels available on the CPS tier without a consequent reduction in price. Cablevision failed to notify the Commission of the rate change and submit a revised rate

[15] *See Viacom Cable, Nashville, Tennessee*, CUID No. TN0148, DA 94-1151, at para. 6a-6c (Cab. Serv. Bur., released Nov. 9, 1994).

[16] *See General Instructions for Completing FCC Form 393*, Instruction No. 5 ("Cable programming service consists of all video programming distributed over a cable system that is not included in the basic service tier or offered on a per-channel or per-program basis");
Instructions for Worksheet 1, Line 121 ("For purposes of using the benchmark tables, a 'satellite-delivered signal' is any cable program service or 'superstation' delivered on a communications satellite that is not a premium service (pay channel or pay-per-view channel)").

[17] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

justification as required by the instructions to Form 393.[18] To determine Cablevision's subsequent permitted per channel charge as of January 1, 1994, and thus Cablevision's maximum permitted price, we rely on the Commission's rules then in effect[19] and therefore reduce the number of channels on the CPS tier on Form 393, Part I effective January 1, 1994 from 22 to 21. This adjustment has been reflected in Appendix A for the period after December 31, 1993.

Conclusions

11. Upon review of the record herein, we conclude that Cablevision's showing supports the maximum CPS tier prices for each franchise area set forth in Appendix A (plus franchise fee) for the periods set forth in Appendix A.[20] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

12. We further conclude that Cablevision must reflect in its FCC Form 1200 rate filings for the period after May 14, 1994 the fact that Cablevision's prices as of March 31, 1994 were unreasonable. We reserve the right to make further adjustments to Cablevision's prices for the period after May 14, 1994, upon completion of our review of Cablevision's FCC Form 1200 rate filings.

13. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint filed on December 14, 1993 against the cable programming service prices charged by V Cable, Inc. d/b/a Cablevision in the City of Euclid, Ohio, CUID No. OH0109 and the complaint filed October 13, 1993 against the cable programming service prices charged by V Cable, Inc. d/b/a Cablevision in the City of Cleveland Heights, Ohio, CUID No. OH0695, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

14. IT IS FURTHER ORDERED that the benchmark filings submitted by V Cable, Inc. d/b/a Cablevision with respect to the City of Euclid, Ohio, CUID No. OH0109 and the City of Cleveland Heights, Ohio, CUID No. OH0695, for the periods set forth in Appendix A justify the maximum prices in each franchise area set forth in Appendix A (plus franchise fee) for V Cable, Inc. d/b/a Cablevision's cable programming service tier.

15. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that V Cable, Inc. d/b/a Cablevision shall refund to subscribers that portion of the amounts paid for cable programming service for the periods set forth in Appendix A[21] to May 14, 1994 which exceeded the maximum prices for each franchise area set forth in Appendix A (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

16. IT IS FURTHER ORDERED that V Cable, Inc. d/b/a Cablevision shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

17. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that V Cable Inc. d/b/a Cablevision shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the

[18] 47 C.F.R. § 76.958. General Instruction 1 (on page 2) to FCC Form 393, clearly requires that while there is a complaint regarding CPS rates pending before the Commission, the cable operator must inform the Commission of any CPS rate increase and submit a revised Form 393.

[19] 47 C.F.R. § 76.922(c) (1993) (amended, effective May 15, 1994).

[20] This finding is based solely on the representations of Cablevision listed in paragraph 5, *supra*, and the modifications described in paragraphs 7 through 10, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[21] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b). Consequently, the periods set forth in Appendix A begin with the date of the filing of the first valid complaint.

City of Euclid, Ohio, CUID No. OH0109 and the City of Cleveland Heights, Ohio, CUID No. OH0695, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix A (plus franchise fee).

18. IT IS FURTHER ORDERED that V Cable, Inc. d/b/a Cablevision shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

	CUID No. OH0109	CUID No. OH0695
Actual Rate	$14.34	$14.52
First Period Maximum Rate	$14.04 for 12/20/93-12/31/93	$13.97 for 10/18/93-12/31/93
Second Period Maximum Rate	$13.40 for 1/1/94-5/14/94	$13.34 for 1/1/94-5/14/94

Before the
Federal Communications Commission
Washington, D. C. 20554

In the Matter of

PRIME CABLE OF CHICAGO, INC.

Petition for Reconsideration

of Cable Services Bureau Order
DenyingPetitions for Reconsideration
of the City of Chicago's Certification
to Regulate Basic Cable Service Rates
(IL0984, IL0985)

ORDER ON RECONSIDERATION

Adopted: March 21, 1995 Released: March 22, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 19, 1994, Prime Cable of Chicago, Inc. ("Prime Cable") filed a timely petition requesting reconsideration of a Memorandum Opinion and Order[1] ("*Order*") adopted by the Cable Services Bureau ("the Bureau") pursuant to delegated authority.[2] The *Order* denied two petitions for reconsideration filed by Prime Cable challenging the certification of the City of Chicago ("the City") to regulate Prime Cable's rates for basic cable service and associated equipment in two franchise areas.[3] In its petition, Prime Cable requests that the Bureau grant its petition for reconsideration and rescind the City of Chicago's certification to regulate Prime Cable's rates. The City did not file an opposition to Prime Cable's petition.[4] The City, however, did file a response to the Bureau's request for clarifying information.[5]

2. Section 405 of the Communications Act of 1934, as amended, allows parties to petition for reconsideration of an order issued by the Commission or its delegated authority.[6] Such a petition must be filed within 30 days from the date of public notice of that action.[7] To warrant consideration, a petition for reconsideration must state the specific form(s) of relief sought by the petitioner and allege with particularity the respects in which the contested action should be changed.[8] The petition should also cite findings of fact or conclusions that the petitioner believes to be in error and indicate how the petitioner believes they should be changed.[9]

II. BACKGROUND

3. Section 623 (a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate the basic cable service rates of cable systems that are not subject to effective competition.[10] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable

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[1] Prime Cable of Chicago, Inc., 9 FCC Rcd 6848 (1994).

[2] Pursuant to Section 0.321 of the Commission's rules, the Bureau has delegated authority to review challenges to a franchising authority's certification to regulate basic rates.

[3] The City of Chicago filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") for the franchise area designated as IL0984 on November 10, 1993, which became effective on December 10, 1993. The FCC Form 328 for the franchise area designated as IL0985 was filed on December 27, 1993 and became effective on January 26, 1994.

[4] Section 1.106 of the Commission's Rules provides that oppositions to petitions for reconsideration must be filed within 10 days of the date of the petition for reconsideration is filed. 47 C.F.R. § 1.106.

[5] *See* Letter dated January 27, 1995 from Mr. Daniel T. Maloney, Assistant Cable Administrator for the City of Chicago to Ms. Lisa M. Higginbotham, Attorney Advisor, Consumer Protection Division.

[6] Communications Act of 1934 § 405, 47 U.S.C. § 405.

[7] 47 C.F.R. § 1.106(f).

[8] 47 C.F.R. § 1.106(d)(1).

[9] 47 C.F.R. § 1.106(d)(2).

[10] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[11] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[12] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[13] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration (filed pursuant to Section 76.911 of the Commission's Rules) alleging the presence of effective competition.[14]

4. In its original petition for reconsideration, Prime Cable argued that its system was subject to effective competition in each of its two franchise areas, designated as IL0984 and IL0985. Prime Cable based its claim of effective competition on the allegation that its system's subscriber penetration rate was less than 30% in each franchise area.[15] To support its claim with respect to franchise area IL0985, Prime Cable submitted evidence indicating that its system serves 54,510 subscribers in the franchise area consisting of 233,640 "households."[16] With respect to franchise area IL0984, Prime Cable submitted evidence indicating that its system serves 61,619 subscribers in the franchise area consisting of 227,768 "households." By using these figures, Prime Cable argued that the ratio of total Prime Cable subscribers in relation to the total number of homes in each franchise area yielded a subscriber penetration rate of 23.3% and 27.1%, respectively. Because each number was below 30%, Prime Cable argued that its system should be exempt from rate regulation and that the City's certification to regulate Prime Cable's basic rates and associated equipment should be rescinded.

5. In its *Order*, the Bureau denied Prime Cable's petitions for reconsideration because Prime Cable, in deriving its penetration rates, inappropriately relied upon commercial establishments and housing unit data, rather than "occupied housing unit" data,[17] to determine the total number of households in its franchise areas.[18] Because our rules require the use of household data, the Bureau rejected Prime Cable's claim of effective competition. As a result, the automatic stay imposed on the City's certification to regulate rates was terminated

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[11] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[12] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[13] 47 C.F.R. §§ 1.106, 76.911; Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) ("*Rate Order*").

[14] 47 C.F.R. § 76.911(c).

[15] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable operator will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's service. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[16] In determining the total number of households in franchise areas IL0984 and IL0985, Prime Cable included commercial establishments as well as vacant housing units.

[17] *See* Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) ("*Third Recon. Order*"). As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units or even partial year vacant units." *Third Recon. Order, supra.* The term "household" is defined for purposes of the 1990 Census data as "all persons who occupy a housing unit." Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Thus, the term "household" reflects only occupied housing units and does not include commercial entities.

[18] Although Prime Cable provided evidence demonstrating penetration levels that excluded commercial entities, the evidence submitted inappropriately included vacant housing unit figures.

and Prime Cable was ordered to file the applicable rate justifications with the City.

6. In this petition, Prime Cable now claims, for the first time, that its two franchise areas (which Prime Cable itself treated as separate areas in its original petitions) should actually be treated as a single franchise area. Prime Cable argues that despite the issuance of two separate CUID numbers (IL0984 and IL0985), "its system, in reality, has a single franchise area because 1) it serves each franchise area by way of a single integrated cable system; 2) the separation of CUID numbers by franchise area is merely a matter of administrative convenience and historical record; and 3) its system cannot charge customers different rates in either CUID area."[19] Prime Cable further argues that, because "the Commission has recently clarified that multiple CUID numbers together may constitute a single franchise area for purposes of rate regulation, Prime Cable's franchise area, for purposes of determining effective competition, should include the combination of areas IL0984 and IL0985."[20]

7. Prime Cable then states that, although it disagrees with the use of occupied housing unit data rather than commercial and housing unit data, its system still qualifies for an exemption from rate regulation because it serves fewer than 30% of the households in the consolidated areas designated as IL0984 and IL0985, the alleged franchise area. Specifically, Prime Cable now claims for the first time that its system serves 114,936 of the 392,423 households (that is, occupied housing units) in the alleged franchise area, or 29.29% of the total number of households. As supporting documentation, Prime Cable submits a computer print-out with sufficient subscriber information to support its claim that it serves 114,936 subscribers in the alleged franchise area. In addition, Prime Cable also provides household information from its data base of billed or billable customers which, Prime Cable claims, "has been developed and maintained using the most objective standards available, including a detailed visual count of serviceable homes and other buildings and comparison to U.S. Postal Records."[21] Prime Cable acknowledges that this database does not exclude vacant housing units. Thus, in order to calculate the number of occupied housing units in the alleged franchise area, Prime Cable takes the number of housing units according to its database (433,617) and applies a vacancy rate of 9.5%.[22] Prime Cable states that applying this rate to Prime Cable's data base results in an occupied housing unit count of 392,423 for the consolidated areas of IL0984 and IL0985, the alleged franchise area.

8. Next, Prime Cable argues that the Commission has adopted an unduly restrictive definition of households for its effective competition test. Prime Cable argues that "the effective competition test measures the number of actual customers ('subscribers') against the number of potential customers ('households') in a particular franchise area."[23] Therefore, it argues that commercial entities should be counted as households for purposes of effective competition, because they are potential customers. Prime Cable further suggests that, "although the Commission has not yet determined the appropriate treatment of commercial accounts in terms of rate regulation, at least in this case, commercial establishments must be counted as 'households' for purposes of applying the effective competition test because the City considers commercial establishments to be 'subscribers' to the cable system."[24] Prime Cable

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[19] *See* December 19, 1994 Petition for Reconsideration at 4.

[20] *See* Times Mirror Cable Television of Orange County, Inc., DA 94-1335, at ¶1, n.1 (Cab. Serv. Bur., released November 29, 1994)(Order determining rate on CPS tier).

[21] *See* December 19, 1994 Petition for Reconsideration, at n.11. With respect to household data, parties with access to more recent data than the 1990 Census may submit such information in support of their petitions. *See* Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities' Certification to Regulate Basic Cable Service Rates, 9 FCC Rcd 3656 (1994) at ¶ 2(3). In light of this, Prime Cable states that it has "submitted household data which is not only more recent than the 1990 Census, but is also more accurate than the four year old census information." *See* December 19, 1994 Petition for Reconsideration, at n.11.

[22] Prime Cable took this 9.5% vacancy rate from the 1990 Census of Population and Housing Summary Tape File 1A - Selected Population and Housing Characteristics. According to this source, the City of Chicago has a 9.5% vacancy rate.

[23] *See* December 19, 1994 Petition for Reconsideration, at 6.

[24] *Id.* at 7, 8.

argues that, in order to preserve the integrity of the effective competition test, the "household" definition must be flexibly applied to include all potential customers (*i.e.*, business addresses as well as residential homes) in the franchise area.[25]

9. Finally, Prime Cable argues that the definition of "households," for purposes of effective competition, should also include vacant housing units. It suggests that "[i]ntuitively, all homes in a cable franchise area represent potential cable customers just as all homes in areas served by electric, gas and telephone companies represent potential customers to those businesses."[26] Prime Cable claims that "the Commission has never distinguished vacant from occupied homes in its various proceedings," and further suggests that the Commission's definition of households is inconsistent with certain standards set in the Commission's horizontal ownership proceeding and subscriber count guidelines.[27] Specifically, Prime Cable suggests that the Commission's use of a homes passed standard in its horizontal ownership proceeding is inconsistent with its requirement that households (*i.e.*, occupied housing units) be used when determining the presence of effective competition. Prime Cable also suggests that the Commission's definition of households is inconsistent with its treatment of multiple dwelling units ("MDUs") under its subscriber count guidelines. It alleges that the Commission "counts each unit of an MDU as a separate household regardless of whether it is occupied or vacant."[28]

III. DISCUSSION

10. Generally, reconsideration is appropriate where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. A petition for reconsideration which relies on facts or information not previously presented to the Commission or its delegated authority may be considered if the Commission or delegated authority determines that consideration of such facts is required in the public interest.[29]

11. In its original petitions, Prime Cable based its effective competition claims on housing data which inappropriately included both commercial and vacant housing units. However, in this petition, Prime Cable now bases its claim on certain "household" data. In addition, for purposes of effective competition, Prime Cable initially treated its two franchise areas separately. In this petition, however, it now seeks to treat its two separate franchise areas as a single area. Prime Cable does not provide sufficient reason as to why it failed to demonstrate effective competition using household data in its original petition. It also does not adequately explain why it is now seeking different treatment of its franchise area for purposes of effective competition. Nonetheless, we believe that the public interest requires consideration of these new arguments and information.

12. First, we reject Prime Cable's argument that the term "household" should be defined to include commercial entities. As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend "households" to have a different meaning than in the 1990 census ..."[30] The 1990 Census defines the term "household" to include only occupied housing units.[31] Thus, as this definition does not include commercial entities, such entities may not be counted for purposes of effective competition. Prime Cable also argues that commercial entities should be included in this case because the City of Chicago considers these entities to be subscribers. This argument lacks merit. The fact that a franchising authority considers a particular group of entities to be subscribers for particular purposes is not the basis for determining whether such entities constitute a "household" for purposes of effective competition under federal law.

13. Second, we reject Prime Cable's argument that the term "household" should include vacant housing units. As we previously stated, the Commission

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25 *Id.* at 8.

26 *Id.* at 9.

27 *Id.* at 7-9.

28 *Id.* at 9.

29 WWIZ, Inc., 37 FCC 685, 686 (1964), aff'd sub. nom. Lorain Journal v. FCC, 351 F.2d 824 (D.C. Cir. 1965) cert. denied, 383 U.S. 967 (1966). *See also*, 47 C.F.R. § 1.106(c)(2).

30 *Third Recon. Order, supra.*

31 Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

has determined that the term "household" as used in the Cable Act does not "have a different meaning than in the 1990 census ..."[32] As the 1990 Census defines the term "household" to include only occupied housing units,[33] we do not agree that vacant housing units should qualify as households. We also do not agree that the Commission has adopted an unduly restrictive definition of the term, by defining "households" as occupied housing units. The Commission has clearly distinguished between vacant and occupied homes in reference to the effective competition tests. It has stated that permitting "an operator to include dwelling units that are empty for a significant portion of the year in determining its penetration rate would eviscerate the validity of this measure as an indicator of the presence of effective competition. People who are not present cannot be presumed to be choosing local competitive alternatives." We are not persuaded, by Prime Cable's reference to alleged practices among electric, gas and telephone companies, that the Commission's definition of households should change. Prime Cable has failed to provide any evidence that electric, gas and telephone companies in fact regard vacant homes as potential customers for purposes of measuring competition. Moreover, Prime Cable has not demonstrated that the same concerns over the availability of choice between local competitive alternatives exist with regard to the provision of the public utilities mentioned. We also are not persuaded that the Commission's definition of households is inconsistent with certain standards set in the Commission's horizontal ownership proceeding and subscriber count guidelines. In a previous effective competition case, the Bureau considered and rejected these same arguments.[34] As the Bureau explained in *Barden*, our analysis of the ownership restrictions in Section 613(f)(1)(A) of the Communications Act of 1934, can be distinguished from our analysis of effective competition. Section 613(f)(1)(A) of the Communications Act of 1934, refers to the number of subscribers any one owner, or party with an attributable interest, can "reach" through cable systems.[35] The Commission has explained that this language can be construed to mean the share of homes passed by a cable operator.[36] No similar language exists with respect to the low penetration standard for measuring effective competition.[37] Also, with regard to our treatment of multiple dwelling units, we note, as we did in *Barden*, that the petitioner has failed to point to any Commission rule which requires that vacant dwelling units be counted as subscribers.[38]

14. Finally, we find that Prime Cable's new argument that its two franchise areas should be treated as a single franchise area lacks merit. As the Commission has stated previously, effective competition must be demonstrated on a franchise area by franchise area basis.[39] Moreover, the Commission has defined "franchise area" as "the area a system operator is granted authority to serve in its franchise."[40] Where a cable system serves more than one separate area, it must demonstrate that effective competition exists in each separate franchise area.[41] Here, the City granted Prime Cable separate franchises to provide cable service in two separate areas: Franchise Area 2 (IL0985) and Franchise Area 3 (IL0984). Therefore, Prime Cable must demonstrate effective competition in each separate franchise area, using data applicable solely to Franchise Area 2 and data solely applicable to Franchise Area 3.[42]

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[32] *Third Recon. Order, supra.*

[33] Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[34] *See* Barden Cablevision, 9 FCC Rcd 4805 (1994).

[35] 47 U.S.C. § 533(f)(1)(A).

[36] Second Report and Order, MM Docket No. 92-264, 8 FCC Rcd 8565, 8576 (1993).

[37] *See Barden*, at 4806 n.14.

[38] *Id.*

[39] *See Rate Order*, at 5672.

[40] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, 9 FCC Rcd 1164, 1180 (1994). ("*First Reconsideration Order*").

[41] Summit Communications, Inc., 9 FCC Rcd 4833, 4834 (1994).

[42] In support of its argument, Prime Cable cites to Times Mirror Cable Television of Orange County, Inc., DA 94-1335 (Cab. Serv. Bur., released November 29, 1994) (Order determining rate on CPS tier) in which the Bureau noted a cable operator's statement that the area designated with two CUID numbers actually constituted one single franchise area. In that case, there was no evidence of two separate authorizations to serve two separate areas. Here,

15. With respect to the franchise area designated as IL0985, we find that Prime Cable has demonstrated the presence of effective competition. In its original petition, Prime Cable submitted evidence indicating that there were 217,690 housing units in this franchise area. Applying the 9.5% vacancy rate for the City of Chicago indicates a count of 197,009 households (*i.e.*, occupied housing units). A comparison of the number of subscribers (53,808) in relation to the number of households (197,009) yields a penetration level of 27.31%. Thus, we find that Prime Cable's system serving IL0985, its franchise area, is subject to effective competition. Thus, its petition is granted with respect to this franchise area.[43]

16. With respect to franchise area IL0984, we find that Prime Cable has not demonstrated the presence of effective competition. In its original petition, Prime Cable submitted evidence indicating that there were 215,927 housing units in this franchise area. Applying the 9.5% vacancy rate for the City of Chicago indicates a count of 195,414 households (*i.e.*, occupied housing units). A comparison of the number of subscribers (61,128) in relation to the number of households (195,414) yields a penetration level of 31.28%. In light of this, we find that Prime Cable has not demonstrated that its cable system, serving franchise area IL0984, is subject to effective competition. Accordingly, its petition is denied with respect to this franchise area.

IV. ORDERING CLAUSES

17. Accordingly, **IT IS ORDERED** that the petition for reconsideration filed by Prime Cable of Chicago, Inc. challenging the certification of the City of Chicago, Illinois to regulate its basic cable rates in the franchise area designated as FCC Community ID No. IL0984 **IS DENIED**.

18. **IT IS FURTHER ORDERED** that the petition for reconsideration filed by Prime Cable of Chicago, Inc. challenging the certification of the City of Chicago, Illinois to regulate its basic cable rates in the franchise area designated as FCC Community ID No. IL0985 **IS GRANTED**.

19. **IT IS FURTHER ORDERED** that the certification of the City of Chicago, Illinois to regulate basic cable service rates in the franchise area designated as FCC Community ID No. IL0985 **IS RESCINDED**.

20. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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according to the City of Chicago, Prime Cable has separate authorizations to serve separate franchise areas. Thus, in order to demonstrate effective competition, Prime Cable must demonstrate the existence of effective competition in each separate franchise area. Moreover, as indicated above, the statute and our rules require that effective competition be demonstrated on a franchise area basis.

[43] Upon grant of a petition for reconsideration, the designated authority may "[s]imultaneously reverse or modify the order from which reconsideration is sought." 47 C.F.R. § 1.106(k)(1)(i).

Before the
Federal Communications Commission
Washington, D. C. 20554

In the Matter of

Cencom Cable Income Partners II, L.P.

CUID No. TX0061, Jasper, TX

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 30, 1995 Released: April 7, 1995

By the Chief, Cable Services Bureau:

1. Here we consider a complaint about the price Cencom Cable Income Partners II, L.P. ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above.[1] Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from

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[1] Subsequent to the time period covered by this Order, Operator was purchased by Charter Communications, Inc. As required by the context, the term "Operator" as used in this Order includes Operator's successors in interest.

[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Opeartor implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its prices for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] 47 C.F.R. § 76.922(b).

May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

4. The first valid CPS complaint in the franchise area which is the subject of this Order was completed and served on Operator and received by the Commission on the dates set forth on Appendix A. Operator filed an FCC Form 393 submission in response to this rate complaint; Operator has also filed amended and supplemental Form 393 filings, most recently on March 21, 1995, in response to an inquiry by Commission staff.[12]

5. In its amended benchmark filing, Operator calculated a maximum permitted price for the CPS tier of $14.31 per month. However, Operator's actual price for the CPS tier was $14.69 per month. Thus, Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, upon review of Operator's Form 393 filing, we have found that Operator has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in its Form 393:

a. In its amended filing, Operator states that it calculated the Inflation Adjustment Factor (Form 393, Part II, Worksheet 1, Line 127, and Form 393, Part II, Worksheet 4, Line 401) using data it relied on when it set its CPS price. If Operator had done so correctly (i.e., if it had completed Form 393 with accurate data, including the most recent inflation data available as of the time it set its price), and if, based on this data, Form 393 indicated that its prices were reasonable, then Operator would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[13] However, Operator admits that the CPS price was excessive even when set.

b. Moreover, the figures Operator used are not consistent with data on which it should have relied in setting its CPS price. According to Operator's amended filing, Operator calculated this price prior to September 1, 1993. Operator used Gross National Product Price Index ("GNP-PI") data released by the U.S. Department of Commerce on May 28, 1993, to complete Lines 122, 123 and 125, but Operator claimed an Adjustment Time Period extending through September 1993 (Line 124), which is inconsistent with an attempt to justify rates based on May 1993 data. Operator's calculation of the Inflation Adjustment Factor is thus incorrect.

c. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date for which Operator filed.[14] On its amended Form 393, Operator entered 12 months on Line 124, indicating that its filing was as of the end of September 1993. On July 29, 1994, the Department of Commerce released corrected inflation data including GNP-PI figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through September 1993, the base date Operator used in justifying its rates, of 1.028.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator's showing supports the maximum

[9] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189, n.195.

[12] For example, Operator filed amended FCC Form 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab.Serv.Bur. 1994).

[13] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316 (1994) ("*Third Order on Reconsideration*").

[14] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

reasonable CPS tier price shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[15]

7. ACCORDINGLY, IT IS ORDERED that the complaint referred to in Appendix A against the cable programming service price charged by Operator in the area referenced above and at Appendix A herein IS GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED that the benchmark filing submitted by Operator justifies the maximum reasonable price set forth in Appendix B (plus franchise fee) for Operator's cable programming service tier.

9. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the community addressed herein that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint (as set forth on Appendix A)[16] to May 14, 1994 which exceeded the maximum price set forth in Appendix B (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

10. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

11. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the community listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price set forth in Appendix B (plus franchise fee).[17]

12. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	DateComplaint Served
TX0061	11/15/93	11/26/93

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
TX0061	$14.69	$14.17

[15] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[16] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[17] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D. C. 20554

In the Matter of

TCI Cablevision of Merced County
CUID No. CA0345 (Merced County)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 3, 1995 Released: April 7, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaint for

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its prices for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

the franchise area which is the subject of this Order was completed and served on Operator and received by the Commission on the dates set forth on Appendix A. Operator filed FCC Form 393 in response; Operator has also filed amended and supplemental Form 393 filings, most recently on May 18, 1994.

5. In its amended benchmark filing of May 18, 1994, Operator calculated a maximum permitted price for the CPS tier of $9.38 per month. However, Operator's actual price for the CPS tier was $9.71 per month. Thus, Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, upon review of Operator's submission we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Operator did not correctly account for its income tax expense. By placing entries in these columns, Operator confirms that it is a tax-paying entity (i.e., a "C" corporation). However, Operator incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[11] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

b. Because Operator has failed to demonstrate that its price for the CPS tier was not unreasonable, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which Operator filed.[12] On its amended Form 393s, Operator calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Operator used in justifying its rate for the franchise area under consideration in this Order, of 1.030.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $9.30 (plus franchise fee) for the period from the filing of the earliest complaint (as set forth in Appendix A) to May 14, 1994.[13]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaint referred to in Appendix A against the cable programming service price charged by Operator in the area referenced in the caption and at Appendix A herein IS GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to

[11] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also* Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

[12] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[13] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the community shown in the caption that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint (as set forth on Appendix A)[14] to May 14, 1994 which exceeded $9.30 (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the community listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price (plus franchise fee).[15]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
CA0345	10/12/93	10/5/93

[14] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[15] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filings.

Before the
Federal Communications Commission
Washington, D. C. 20554

In the Matter of

CUID Nos. CA0178, Burbank
CA0180, Glendale

Sammons Communications, Inc.

Benchmark Filings to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 5, 1995; Released: April 7, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in Burbank, California and Glendale, California. Operator has chosen to attempt to justify its price through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing,

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in Burbank and Glendale were completed and served on Operator and received by the Commission on the dates set forth in the Appendix. For both communities, Operator filed an FCC Form 393 in response. For the Glendale community, Operator also filed amended Form 393 filings on November 18, 1993 and June 24, 1994 and a supplemental filing on February 6, 1995.[11]

5. In its benchmark filings for both Burbank and Glendale, Operator calculated a maximum permitted CPS rate of $8.70 per month (plus franchise fee). Operator's actual monthly charge for its CPS tier was $9.80 (plus franchise fee). Thus, Operator has failed to show that its rate for the CPS tier was not unreasonable. Furthermore, upon review of Operator's Form 393 filings, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. On its Form 393 for Burbank, Operator calculated the Inflation Adjustment Factor (Line 127, Worksheet 1, Part II) as of the end of October 1993 using data released by the U.S. Department of Commerce on August 31, 1993. However, Operator's use of October 1993 as the date through which it calculated the inflation adjustment is impermissible. Operator was served with a rate complaint on September 1, 1993. The instructions to FCC Form 393, page 11, require that the Inflation Adjustment Factor be calculated using "the number of whole months from September 30, 1992 to the date you will submit this form." In general, a cable operator must submit a justification of its rates no more than 30 days after service of the earliest valid complaint.[12] Operator cannot be permitted to claim an additional inflation adjustment simply because it did not file its Form 393 within this 30 day period. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the latest date contemplated by the Form 393 instructions.[13] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.028 as the Inflation Adjustment Factor through September 1993, the base date Operator should have used in justifying its rate in Burbank.

b. In its optional supplemental filing in response to the *Public Notice* for Glendale, Operator claimed an Inflation Adjustment Factor of 1.047, which indicates that inflation was taken through May 1994 using data released by the U.S. Department of Commerce on July 29, 1994. However, for reasons discussed in the preceding paragraph, at the time Operator was required to respond to the first valid rate complaint, the instructions to Form 393 permitted it to claim an inflation adjustment only through October 1993. Operator cannot claim an additional inflation adjustment simply because it subsequently amended its rate justification.[14] We therefore must recalculate the the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date for which

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator filed an amended FCC Form 393 on June 24, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994). Operator submitted additional information in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings. Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994) and Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 95-87 (Jan. 20, 1995) (together, *Public Notice*).

[12] *See* 47 C.F.R. § 76.956(a).

[13] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[14] We note that in its earlier filings Operator correctly calculated the inflation adjustment through October 1993.

Operator should have filed. On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.030 as the Inflation Adjustment Factor through October 1993, the base date Operator should have used in justifying its rate in Glendale.

6. Upon review of the record herein, and having incorporated the adjustments discussed above,[15] we conclude that Operator has failed to justify the rate it was charging during the periods in question. Operator's showings justify a maximum reasonable CPS tier price of $8.57 per month (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in the Appendix) to May 14, 1994.[16]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in the Appendix against the cable programming service price charged by Operator in Burbank, California and Glendale, California ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in Burbank, California and Glendale, California that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth in the Appendix)[17] to May 14, 1994 which exceeded $8.57 per month (plus franchise fee), plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to Burbank, California and Glendale, California, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal $8.57 per month (plus franchise fee).[18]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, a price that reflects the reduction in the CPS rate determined in this Order.

12. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that in Glendale, California, Operator shall not be required to obtain advance approval of adjustments to its CPS price for one year following the release of this Order, due to Operator's having submitted in good faith an optional supplemental filing in response to our *Public Notice*.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[15] These adjustments have the effect of causing Operator to calculate its permitted rates from Form 393, Part II, Worksheet 2 rather than Worksheet 1. Worksheet 2 data was not provided on the Form 393 filings since Operator's calculations, before our adjustments, did not require it. Therefore, we have computed Worksheet 2 by using data supplied by Operator on its Form 1200 filings.

[16] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[17] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[18] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filings.

Appendix

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
CA0178	9/8/93	9/1/93
CA0180	10/18/93	10/13/93

Before the
Federal Communications Commission
Washington, D. C. 20554

In the Matter of

Sammons Communications, Inc.
CUID No. PA0622, Mechanicsburg

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 5, 1995 Released: April 7, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider a complaint about the price Sammons Communications, Inc. ("Operator") was charging for its cable programming service ("CPS") tier in Mechanicsburg, Pennsylvania. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in Mechanicsburg, Pennsylvania IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D. C. 20554

In the Matter of

COX CABLE SAN DIEGO, INC.

Appeal of Local
Rate Order of City of
Chula Vista, CA.;

Appeal of Local
Rate Order of City of
La Mesa, CA.;

Appeal of Local
Rate Order of City of
Poway, CA.;

Appeal of Local
Rate Order of City of
San Diego, CA.

CONSOLIDATED ORDER

Adopted: April 5, 1995; Released: April 7, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. By this order, the Commission consolidates and resolves four separate appeals of local cable rate orders filed by Cox Cable San Diego, Inc. ("Cox") on August 24, 1994. The first appeal involves the local rate order adopted by the City of Chula Vista, California on June 21, 1994, which became effective on July 25, 1994. The second appeal involves the local rate order adopted by the City of La Mesa, California on June 14, 1994, which became effective on July 25, 1994. The third appeal involves the local rate order adopted by the City of Poway, California on June 28, 1994, which became effective on July 25, 1994. The fourth appeal involves the local rate order adopted by the City of San Diego, California on July 25, 1994. The Bureau has determined that the proceedings are sufficiently similar to justify the joint resolution of all of the issues raised by each party in a single consolidated order.[1] We find that this consolidation will not prejudice any of the parties and will serve the interests of administrative efficiency.

2. Each of the local rate orders establishes a new regulated rate schedule for Cox's basic service tier rates and associated equipment.[2] Specifically, each city's local rate order requires Cox to implement certain rate reductions and to issue refunds to subscribers, dating back to September 1, 1993.[3]

3. Cox raises three issues on appeal. First, Cox argues that the Cities have misapplied the Commission's rate regulations by refusing to offset equipment undercharges against programming overcharges in determining its total refund liability. Second, Cox

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[1] Cox addresses the same issues and relies on substantially the same arguments in each appeal. Likewise, the cities of Chula Vista, La Mesa, Poway, and San Diego (collectively, "the Cities") have filed substantially similar oppositions. In addition to the four separate appeals of the local cable rate orders, Cox also filed separate petitions for stay of the local cable rate order of each of the four cities involved in this proceeding. Because we are resolving these disputes on the merits presented in the several appeals, the requests for stay have been rendered moot.

[2] Each of the four cities held separate public hearings and made separate rate decisions. The cities of Chula Vista, La Mesa, and Poway jointly contracted with the same consulting firm, Public Knowledge, Inc., to review the FCC Form 393 submitted by Cox. *See, e.g.*, La Mesa Opposition at 1. We note that our rules permit communities that are served by the same system to make arrangements to share the cost of data collection (*e.g.*, hiring an independent consulting firm to review the Form 393 submitted by an operator) and to make independent rate decisions. *See* Report and Order and Further Notice of Proposed Rulemaking, MM Docket 92-266, 8 FCC Rcd 5631, 5688 (1993) ("*Report and Order*"). The City of San Diego relied on its Audit Division to conduct a review of Cox's Form 393. The Audit Division's findings regarding Cox's Form 393 are substantially similar to those made by the other cities' private consultant.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

argues that it was improper for the Cities to disallow equipment revenue (in Line 204) attributable to the lease of decoders. Cox asserts that the charges for the decoder that the Cities disallowed were included in the fee it charged customers who subscribed to premium channels, and since that portion of the premium channel fee was, in fact, a fee for lease of regulated equipment, it should be added to Cox's equipment revenue. Third, Cox argues that the Cities erroneously "refreshed" the inflation figures in its FCC Form 393, even though its rates were justified using the old data.

4. In response, the Cities maintain that they properly applied the Commission's regulations in their rate orders in regard to offsets. Alternatively, the Cities argue that, if the Commission decides that a refund offset is applicable in this case, the offset should take into account any overcharges on the cable programming service ("CPS") tiers, and the offset should be made in proportion to the number of channels in use on each tier. With respect to the decoder issue, the Cities argue that they were justified in removing that portion of the equipment revenue attributed to the lease of the decoders since Cox could not prove that it actually charged premium subscribers for them. With respect to the inflation adjustment issue, the Cities argue that they properly adjusted Cox's inflation data in accordance with our rules.[4]

II. DISCUSSION

5. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[5] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[6] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[7] If the Commission reverses a franchising authority's decision, it will not substitute its own decision, but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[8]

A. Refund Offsets

6. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[9] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its equipment and installation costs and maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

7. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of

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[4] The Cities also assert that the Commission should "ignore" the Form 393 Cox submitted as an exhibit to its appeals because that Form is different from the ones Cox submitted to the Cities for rate review and because the Cities have not had an opportunity to review that new version. We need not address this issue since it is not necessary for us to review Cox's Form 393 in deciding this appeal.

[5] 47 C.F.R. § 76.944.

[6] *See Report and Order*, 8 FCC Rcd at 5731; Third Order on Reconsideration in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4346 (1994) ("*Third Recon. Order*").

[7] *Third Recon. Order*, 9 FCC Rcd at 4346.

[8] *Id.*

[9] To the extent that an operator has sought to take advantage of the refund deferral period available under the Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266, 9 FCC Rcd 4119, 4183-4185 (1994) ("*Second Recon. Order*"), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

the initial date of regulation ("current rate") or as of September 30, 1992.[10] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate level is below the applicable benchmark rate, then the operator's rate level is deemed reasonable, but it must remain at its current level. If its current per-channel rate level exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate level to the applicable benchmark rate. If its September 30, 1992 per-channel rate level is above the benchmark rate, it must reduce this rate level to the benchmark rate or by 10%, whichever reduction is less. After computing the permitted rate level in this manner (whether based on current rates or September, 1992 rates), monthly equipment and installation costs are removed to derive the maximum permitted programming rates. Maximum permitted rates for equipment and installation are based on actual cost and are separately calculated in Part III of the Form 393. In reviewing Cox's Form 393, the Cities determined that Cox's rates for basic service exceeded its maximum permitted rate and should be reduced. Cox asserts that while the Cities have ordered Cox to refund the excessive charges for basic service, it did not allow Cox to reduce the amount of the refund by the amount that Cox was undercharging for basic equipment.

8. After setting the various regulated rates that an operator is permitted to charge on a prospective basis, a franchising authority should then determine if the operator is liable for any subscriber refunds. A refund liability can be imposed when an operator's actual charges exceed maximum permitted levels during the applicable period of review.[11] If an operator's aggregate revenues computed from its actual rates exceed its revenues computed from its permitted rates during the period of review, the operator must refund the difference to subscribers.[12] In this proceeding, any refunds to be paid by Cox should be calculated based on this method.

9. While the Commission will sustain the decisions of franchising authorities if there is a reasonable basis for doing so, we expect franchising authorities to adhere to the mathematical principles underlying the benchmark methodology, particularly when calculating an operator's refund liability.[13] In this case, the Cities have directed Cox to reduce its basic service charges to the maximum permitted level and to issue refunds without regard to the fact that some rates for equipment are below the maximum permitted levels. We find that the Cities must offset or reduce any refunds they may order by the difference between the actual equipment and installation rates that Cox charged and the maximum permitted rates that it could have charged during the applicable period of review.[14] We are remanding this issue to the Cities so that they can reconsider their respective rulings in a manner consistent with our findings.[15]

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[10] An operator must calculate its rate in effect on September 30, 1992, only if its current rate level is above the benchmark rate. If an operator's current rate level is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

[11] *See* 47 C.F.R. § 76.942.

[12] *See Third Recon. Order*, 9 FCC Rcd at 4353 ("Although maximum permitted rates are always determined on an unbundled basis, *i.e.*, separately for program service and equipment, refund liability may stem from bundled rates. We conclude that the refund liability should be calculated based on the difference between old bundled rates and the sum of the new unbundled program service charge(s) and the new unbundled equipment charge(s).").

[13] *See Report and Order*, 8 FCC Rcd at 5731; *Third Recon. Order*, 9 FCC Rcd at 4346.

[14] *See Third Recon. Order*, 9 FCC Rcd at 4353. However, we note that operators may not set programming service rates at higher than permitted maximum rates to recover lost equipment revenues when they voluntarily price equipment rates below their maximum permitted levels. To permit operators to do so would undermine Congress's intention to create a competitive market of cable equipment providers. *See* Communications Act, § 624A(c)(2)(C), 47 U.S.C. § 544A(c)(2)(C); Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992: Compatability Between Cable Systems and Consumer Electronics Equipment, First Report and Order, 9 FCC Rcd 1981, 1982 (1994).

[15] *See* TCI Cablevision of North Central Kentucky, Inc. (Mount Washington, KY), DA 94-1479 (Cab. Serv. Bur., released December 14, 1994); *see also* Community TV Corporation (Town of Alton, N.H.), DA 95-147 (Cab. Serv. Bur., released February 6, 1995).

10. The Cities argue that if the Commission decides that a refund offset is applicable in this case, the offset should be apportioned between the basic and CPS service because "the retroactive equipment charge is for equipment used for both tiers,"[16] and because "[t]his apportionment method would be consistent with the Form 393 procedures, where the total cost of the equipment basket (Step G Line 34) affects (at Worksheet 3 Line 301) the maximum permitted rate applied to each tier of service."[17] The Cities' argument is unpersuasive.

11. We have previously stated that the rate regulation for basic equipment covers all equipment used by subscribers to receive the basic service tier, even if the equipment is also used for other cable services.[18] Therefore, all rate calculations involving such equipment, including offsets, are properly confined to the basic tier. Apportioning refund offsets between basic and CPS tiers, based on equipment charges, would not be consistent with our regulatory scheme which considers all equipment used to receive basic service as basic equipment.[19]

B. Charges for Decoders

12. Each city's rate order reflects the removal of a portion of the equipment revenue that Cox included in Line 204 of its Form 393 filing. According to the Cities, during the applicable period, Cox leased decoders at no charge to those subscribers who also purchased one or more pay services. Cox's decoders, also known as addressable converters, can receive, in addition to basic service and cable programming service tiers, premium channels and pay-per-view services.[20] The Cities further assert that Cox provided these decoders for free in order to induce subscribers to purchase pay services. The Cities also disallowed inclusion of these decoders as equipment revenue because none of the pay service revenue received from these subscribers was booked separately as equipment revenue in Cox's accounting records and, therefore, charges for these decoders could not be verified. According to the Cities, only in preparing its Form 393 did Cox assign some of the pay service revenue to the equipment category and assign a value to the decoders based on what subscribers who did not take any pay services paid for the decoders.

13. Cox argues that it was improper for the Cities to disallow equipment revenue attributable to the lease of decoders. Ordinarily, Cox charged those subscribers who purchased only tiered services a monthly fee of two dollars for the rental of decoder equipment, which Cox included in its Form 393 as part of its equipment revenue. Cox contends that it should also be able to consider as part of its equipment revenue a charge of $2.00 for each subscriber who did not pay separately for a decoder. In support of this proposition, Cox alleges that the price of the decoder was included in the fee it charged subscribers for premium channels, and since that portion of the premium channel fee was, in fact, a fee for lease of regulated equipment, it should be added to Cox's equipment revenues. Cox disputes the Cities' charge that it provided the decoders at no charge as a promotional offering. Cox asserts that it was its standard practice to bundle decoder revenue with the cost of premium services. Finally, Cox argues that the City's reliance on the fact that Cox did not book the decoder revenue as equipment revenue is misplaced. Cox asserts that, prior to rate regulation, cable operators were not required to maintain their books so as to distinguish revenue received for providing premium services from equipment revenue.

14. Because the decoders at issue here are also used to receive the basic service tier, in addition to other tiers of services, they constitute equipment subject to regulation by local franchising authorities.[21] In this case, however, Cox failed to satisfy its burden of proving that it actually charged premium subscribers for the decoders in question and its burden of demonstrating that any charges for the decoders were not already

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[16] San Diego Opposition at 10 n.7.

[17] Chula Vista Opposition at 7-8; Poway Opposition at 6; and *accord* La Mesa Opposition at 2 ("The City of La Mesa supports and concurs with the views expressed in Chula Vista's [Opposition]").

[18] *See Report and Order*, 8 FCC Rcd at 5800; *see also* 47 C.F.R. § 76.923(a).

[19] We note that none of our decisions to date have allowed for any type of refund offsets between tiers.

[20] *See Report and Order*, 8 FCC Rcd at 5802.

[21] *See* 47 C.F.R. § 76.923(a).

incorporated in its regulated equipment charges.[22] As the Cities point out, Cox did not book any of the pay service revenue received as equipment revenue in its accounting records for the applicable period, and, therefore, charges for the decoders could not be verified by the Cities. Cox does not argue that any of the Cities denied it the opportunity to provide proof of its alleged charges for the decoders, but insists that it should nevertheless be able to charge for the decoders in question. Even after Cox received the rate review reports from the Cities which indicated that decoder charges would be disallowed from equipment revenue, Cox presented no new information that would justify including the decoders as regulated revenue. For the foregoing reasons, it was reasonable for the Cities to disallow in Line 204 of Cox's Form 393 filing that portion of equipment revenue attributable to the lease of decoders. We will, therefore, affirm the Cities' rate orders on this issue.

C. Inflation Factor Calculation

15. On the FCC Form 393, the Commission permits an inflation adjustment of the benchmark rate. The inflation adjustment is calculated by comparing the Gross National Product Price Index ("GNP-PI") of September 1992 with the GNP-PI of the initial date of regulation. The GNP-PI is released quarterly by the Department of Commerce and the figure for a specific quarter is subject to later refinement by the Department of Commerce.[23] That refinement can affect the benchmark rate. In order that operators not be penalized for relying on earlier figures provided in good faith efforts to comply with our rules, the Commission has stated that, "[r]ates set in accordance with then-current inflation and other data will not be deemed unreasonable solely on account of subsequent changes in that data."[24] The Commission has also stated, however, that "[w]hen current rates are not justified by analysis using the old data (so that a rate adjustment would be necessary in any event), cable operators will be required to correct their rates pursuant to current data. In these circumstances, the resulting rates must be based on current data."[25]

16. Cox claims that the data used to calculate the inflation factor on its initial FCC Form 393 is correct and should have been accepted by the Cities. Although the inflation data that Cox used in its initial filing was current at the time of that filing, the Form 393 that Cox submitted required changes unrelated to the inflation data. For example, in reviewing Cox's Form 393, the Cities found errors in Cox's calculation of equipment basket data since it omitted rate of return and income tax information, which finding Cox does not challenge.[26] The Cities disallowed Cox's alleged equipment revenue in Line 204 attributable to the lease of decoders to premium channel subscribers.[27] In addition, the cities of Chula Vista, La Mesa, and Poway found errors with respect to Cox's incorrect count of satellite channels. As such, the Cities determined that there were other problems in the Cox filing in addition to outdated inflation factors, and that Cox's rates would not have been justified in any event even if the old inflation data were accepted by the Cities. Therefore, the Cities' determination was correct that the inflation factor must be recalculated using the updated inflation data.

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[22] *See* 47 C.F.R. § 76.937. *See also* Sammons Communications, Inc., DA 95-194 (Cities of Burbank and Glendale, CA), at ¶ 14 (Cab. Serv. Bur., released February 10, 1995).

[23] *See Public Notice*, Questions and Answers on Completion of Form 393 and Associated Filing Requirements, Question No. 9 (released November 10, 1993) ("The Commission stated in a Question and Answer sheet released on July 30, 1993, that the most recently available GNP-PI should be used when making rate benchmark calculations. In this regard, the GNP-PI for the third quarter of 1992, which is listed in Form 393, Part II, Worksheet 1, was updated by the Department of Commerce on August 31, 1993 after the form was printed. The new number is 122.5. This updated number for the GNP-PI should be used rather than the number printed on the form.").

[24] *Public Notice*, Questions and Answers on Cable Television Rate Regulation, Question No. 5 (released June 1, 1994). *See Third Recon. Order*, 9 FCC Rcd at 4349-4350; 47 C.F.R. § 76.922(b)(9)(i).

[25] *Third Recon. Order*, 9 FCC Rcd at 4349-4350 (emphasis in original). *See* 47 C.F.R. § 76.922(b)(9)(iii).

[26] When the rate of return and income taxes are included, Cox's Line 301, Monthly Equipment and Installation Cost, is greater than that it reported. Line 301 is subtracted from the Base Rate per Channel, and so a larger entry produces a lower Maximum Initial Permitted Rate per Channel. The reduction in the Maximum Initial Permitted Rate per Channel, because of this adjustment, results in Cox's basic tier rates being unreasonable under the benchmark formula.

[27] *See* ¶¶ 13-15, *supra*, of this Order.

D. Declaratory Ruling Regarding Franchise Fees

17. The City of La Mesa, in its Opposition,[28] asks the Commission to issue a declaratory ruling stating that Cox, since October of 1992, has been inappropriately passing through to La Mesa subscribers additional franchise fees in violation of the franchise agreement.[29] This matter, however, is not specifically addressed in the City's rate order, and Cox did not ask the Commission to address this franchise fee matter on appeal.[30] By seeking a declaratory ruling on this matter, the City of La Mesa in essence is asking the Commission to review the City's franchise agreement with Cox, and specifically its own decision on this franchise fee matter, which is inappropriate, given the context of this Commission proceeding, and inconsistent with Section 76.944 of our rules.[31] Therefore, we deny the City of La Mesa's request that we issue a declaratory ruling on this franchise fee matter.

III. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED** that the following Commission proceedings: (1) the appeal by Cox Cable San Diego, Inc. of the local rate order adopted by the City of Chula Vista, California; (2) the appeal by Cox Cable San Diego, Inc. of the local rate order adopted by the City of La Mesa, California; (3) the appeal by Cox Cable San Diego, Inc. of the local rate order adopted by the City of Poway, California; and (4) the appeal by Cox Cable San Diego, Inc. of the local rate order adopted by the City of San Diego, California, are consolidated into one proceeding.

19. **IT IS FURTHER ORDERED** that Cox Cable San Diego, Inc.'s appeal of the rate order adopted by the City of Chula Vista, the City of La Mesa, the City of Poway, and the City of San Diego, regarding the refund offset issue is **REMANDED** to the respective local franchising authorities for resolution in accordance with the terms of this Consolidated Order. **IT IS FURTHER ORDERED** that the request made by the City of Chula Vista, the City of La Mesa, the City of Poway, and the City of San Diego that any refund offset should be apportioned between basic service and cable programming service tiers is **DENIED.**

20. **IT IS FURTHER ORDERED** that Cox Cable San Diego, Inc.'s appeal of the rate order adopted by the City of Chula Vista, the City of La Mesa, the City of Poway, and the City of San Diego, regarding the issue of Cox's decoder charges is **DENIED.**

21. **IT IS FURTHER ORDERED** that Cox Cable San Diego, Inc.'s appeal of the rate order adopted by the City of Chula Vista, the City of La Mesa, the City of Poway, and the City of San Diego, regarding the inflation factor calculation issue is **DENIED**.

22. **IT IS FURTHER ORDERED** that the City of La Mesa's request that the Commission issue a declaratory ruling regarding franchise fees is **DENIED**.

23. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[28] La Mesa Opposition at 2.

[29] Cox indicates in a letter, dated July 14, 1994, to the City of La Mesa that "[t]he additional franchise fee that Cox has been collecting will expire in October of 1994, at which time [Cox] will revert to the `normal' fee structure." La Mesa Opposition, Exhibit E. The City of La Mesa claims that Cox has been improperly passing through excess franchise fees to La Mesa subscribers that were underpaid in previous years, predating rate regulation. According to a report prepared by the City of La Mesa's consultant, Cox has been applying a 5.703% franchise fee as a pass through to subscribers in La Mesa, when the franchise agreement calls for only 5.0%. *See* Appeal, Exhibit C at 7.

[30] This franchise fee matter is addressed by the City's consultant in his report and in a letter from Cox to the City. *See* La Mesa Opposition at 2 (citing Appeal, Exhibits C and D).

[31] *See* 47 C.F.R. § 76.944.

Before the
Federal Communications Commission
Washington, D. C. 20554

CC Docket No. 87-266

In the Matter of

TELEPHONE COMPANY -
CABLE TELEVISION
Cross Ownership Rules,
Sections 63.53 - 63.58

ORDER

Adopted: April 6, 1995; Released: April 6, 1995

By the Chiefs, Policy and Rules Division, Cable Services Bureau, and Policy and Program Planning Division, Common Carrier Bureau:

1. On April 4, 1995, the Center for Media Education, Consumer Federation of America, Media Access Project, and People for the American Way (collectively, "CME, et al.") filed a request for extension of time[1] to submit reply comments to the Fourth Further Notice of Proposed Rulemaking in the above-captioned proceeding.[2] Comments were due March 21, 1995. Reply Comments are due April 11, 1995. CME, et al. requests that the deadline for filing reply comments be extended three weeks, so that reply comments would be due May 2, 1995.

2. CME et al. states that additional time is necessary because of the complexity of the issues raised in the Fourth Further Notice. CME, et al. notes that the Commission previously granted a motion for extension of time filed by Capital Cities/ABC, Inc. and National Broadcasting Company, Inc., extending the original deadlines for filing comments and reply comments in response to the Fourth Further Notice from March 6, 1995 and March 27, 1995, to March 21, 1995 and April 11, 1995, respectively. CME, et al. states that over sixty parties filed comments, many of which make extensive legal and policy arguments meriting careful consideration. They assert that the current reply period is too short to permit adequate time to fully review these arguments. In particular, CME, et al. states that the current reply deadline imposes a particular hardship on them because of their very limited resources and because of the organizations' simultaneous involvement in other important policy and legislative issues, including Commission proceedings.

3. We do not routinely grant extensions of time.[3] We are concerned that the requested extension could unduly delay the expeditious resolution of the issues presented by the Fourth Further Notice. In recognition of the complexity of the issues involved with this proceeding, however, we have already extended the time periods for filing comments and reply comments. The existing schedule provided sixty-one days in which to file comments and an additional twenty-one days for reply comments. We believe that these periods should be sufficient for preparing and filing comments and reply comments. CME, et al. has failed to provide support or documentation sufficient to show that additional time for filing reply comments is necessary in order to provide a reasonable opportunity to meaningfully participate in this proceeding. We therefore deny the request made by CME, et al.

4. Accordingly, IT IS ORDERED, that the Motion For Extension Of Time filed by the CME, et al. IS DENIED.[4]

FEDERAL COMMUNICATIONS COMMISSION

Gary Laden
Chief, Policy and Rules Division
Cable Services Bureau

James D. Schlichting
Chief, Policy and Program Planning Division
Common Carrier Bureau

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1 See Motion for Extension of Time, The Center for Media Education, Consumer Federation of America, Media Access Project, and People for the American Way (filed April 4, 1995).

2 Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Fourth Further Notice of Proposed Rulemaking, CC Docket No. 87-266, 60 FR 8996 (February 16, 1995) ("Fourth Further Notice").

3 See Section 1.46(a) of the Commission's rules, 47 C.F.R. § 1.46(a).

4 This action is taken pursuant to Section 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j) and 155(c), and authority delegated thereunder pursuant to Section 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291.

Before the
FEDERAL COMMUNICATIONS COMMISSION DA 95-942
Washington, D.C. 20554

In the Matter of	)	
	)	
OPERATOR COMMUNICATIONS, INC.	)	
dba ONCOR COMMUNICATIONS, INC.	)	
	)	File No. ENF-95-02
Investigation of Rates and Charges	)	
for Interstate Operator Services	)	

MEMORANDUM OPINION AND ORDER
AND ORDER TO SHOW CAUSE

Adopted April 26, 1995; Released April 27, 1995

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. By this Memorandum Opinion and Order and Order to Show Cause, we are directing Operator Communications, Inc. (OCI), an operator service provider (OSP), dba Oncor Communications, Inc., (Oncor)[1] to disclose immediately certain additional information to consumers with regard to its interstate operator services during this proceeding to ensure that consumers may more fully be informed of applicable rates and charges and better able to make informed choices when placing operator service calls.[2] Further, we are directing Oncor to reduce any of its OSP rates and charges for interstate telecommunications services, including various associated commissions and surcharges, that exceed, by more than 15 percent, those of AT&T for comparable services. Alternatively, should Oncor not so reduce its rates, but rather seek to justify them, we are directing Oncor to file certain expense, revenue, and investment information that will allow us to prescribe just and reasonable rates. In the latter event, we are ordering Oncor

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1. OCI, formerly known as International Telecharge, Inc. dba Oncor Communications, Inc., is a management services company and provides telecommunications management services for OCI. Unless the context indicates otherwise, we shall refer to OCI herein as Oncor. All the stock of both OCI and Oncor Communications, Inc. is owned by Ronald J. Haan.

2 Currently, under Section 64.703(a)(1) of the Commission's Rules, 47 C.F.R. § 64.703(a)(1), an OSP must "[i]dentify itself, audibly and distinctly, to the consumer at the beginning of each telephone call and before the consumer incurs any charge for the call." This requirement is often called "branding."

to show cause why it should not alert consumers before connecting a call that its rates might be higher than the consumer may think, that the Commission is investigating its rates, and that a surcharge of up to $10.00 per call may be assessed.

II. BACKGROUND

2. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA)[3] requires that interstate OSPs file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.[4]

TOCSIA also provides that if, upon review by the Federal Communications Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.[5]

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3 47 U.S.C. § 226

4 Id. § 226(h)(1)(A). For purposes of the Commission's operator service rules, Sections 64.703 through 64.707 and Section 68.318, "[o]perator services means any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than: (1) Automatic completion with billing to the telephone from which the call originated; or (2) Completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer." 47 C.F.R. § 64.708(g). "Provider of operator services means any common carrier that provides operator services or any other person determined by the Commission to be providing operator services." 47 C.F.R. § 64.708(i).

An "aggregator" is "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." 47 C.F.R. § 64.708(b).

5 47 U.S.C. § 226(h)(2).

3. TOCSIA was enacted to achieve two main purposes. First, the legislation sought to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls.[6] TOCSIA also sought to ensure that consumers have the opportunity to make informed choices in making such calls.[7] TOCSIA therefore imposed various information disclosure and operating requirements on OSPs and call aggregators and charged the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. Pursuant to TOCSIA, the Commission adopted comprehensive regulations governing the practices and services of OSPs and the call aggregators with whom they contract to provide operator services.[8] These regulations established rules concerning consumer information, call blocking, restrictions on certain charges, and equipment capabilities. TOCSIA and the Commission's implementing rules established consumer safeguards designed to inform consumers what carrier is presubscribed to an aggregator phone, e.g., pay phone or hotel room phone. Also, it was the Commission's expectation that its requirement that aggregators allow access to the consumer's preferred carrier by means of an access code would decrease the incidence of consumers being connected to an unfamiliar OSP.[9] Section 226(h)(1)(B) of TOCSIA authorizes the Commission to waive the requirements for an informational tariff after four years from its enactment,

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6 Id. § 226(d)(1)(A), (B); see S. Rep. No. 439, 101st Cong., 2d Sess. 1 (1990)("The purpose of the bill is to protect consumers who make interstate operator services calls from pay telephones, hotels, and other public locations against unreasonably high rates and anticompetitive practices."); see also H.R. Rep. No. 213, 101st Cong., 1st Sess. 2 (1989) (The purpose of the bill is "to protect telephone consumers against unfair prices and practices of some operator service providers (OSPs), yet allow the legitimate companies in the industry the opportunity to compete in the market").

7 47 U.S.C. § 226(d)(1).

8 See generally Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313: Report and Order, 6 FCC Rcd 2744 (1991) (hereinafter Report and Order); Order on Reconsideration, 7 FCC Rcd 3882 (1992) (hereinafter Reconsideration Order). A complete discussion of the background of these rule making efforts is contained in the Report and Order, 6 FCC Rcd at 2746-48, and in the Reconsideration Order, 7 FCC Rcd at 3882-83.

9 See Final Report of the Federal Communications Commission Pursuant to the Telephone Operator Consumer Services Improvement Act of 1990 (Nov. 13, 1992) (hereinafter TOCSIA Final Report) at 30.

provided the Commission determines such waiver will not adversely affect the continued achievement of TOCSIA's regulatory objectives.[10] In 1992, the Commission concluded in its Final Report to Congress pursuant to TOCSIA that, to the extent that consumers were aware of and exercised their option of using access codes to reach their carrier of choice, the presubscribed OSP's rates were essentially irrelevant and that consumers' ability to exercise choice "is the best regulator of OSP rates."[11]

5. However, for the past several years, complaints about OSP rates have been the third-largest source of complaints (behind slamming and information service complaints). The complaint level indicates that numerous consumers still use the presubscribed carrier and are outraged at later discovering that they were charged a rate much higher than they expected. These calls often average $1.00 per minute, and a much higher per-minute charge is common for calls of short duration because the OSP includes a commission of several dollars per call for the pay phone owner. Based on reported data, the Commission has estimated that consumers could save approximately $280 million annually by avoiding the highest-priced OSPs.[12] More than half of the nation's state attorneys general have joined in a petition to the Commission to require OSPs to provide more information to consumers who use pay phones or other public phones before connecting calls.[13] The attorneys general believe this to be necessary to prevent unfair and deceptive practices and to

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10 47 U.S.C. § 226(h)(1)(B).

11 TOCSIA Final Report at 31.

12 In the Matter of Billed Party Preference for 0+ InterLATA Calls, Further Notice of Rulemaking, 9 FCC Rcd 3320, 3323 (1994).

13 See petition filed by the Telecommunications Subcommittee of the National Association of Attorneys General (February 8, 1995) at 6; letter from David J. Gilles to William F. Caton (Feb. 9, 1995)(advising that the attorneys general for the states of Nevada and New York have joined in the petition); letter of David J. Gilles to William F. Caton (Feb. 15, 1995) (advising that the Attorney General for the State of South Carolina has joined in the petition). Interested persons were invited to file statements opposing or supporting the petition (RM No. 8606) by March 31, 1995. See Public Notice, Report No. 2059 (February 28, 1995). The pleading cycle for comments subsequently was extended to April 12, 1995 and to April 27, 1995 for reply comments. Public Notice, DA 95-473 (March 13, 1995).

improve the opportunity for consumers to make informed choices in accordance with TOCSIA.[14]

III. ONCOR'S OSP RATES

6. Oncor is an interexchange telecommunications common carrier that provides intrastate, interstate and international services, primarily operator-assisted telecommunications services, in competition with AT&T, MCI, Sprint, the Regional Bell Operating Companies, and other OSPs.[15] Oncor has an informational tariff on file with this Commission, purportedly in compliance with Section 226(h)(1)(A) of TOCSIA,[16] and tariffs covering intrastate service that it has filed with 31 state public utility commissions.[17] Under Section 226 of the Act, as previously noted, each OSP must have an informational tariff on file specifying its current rates, terms, and conditions with respect to calls for which it provides operator services.[18]

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14 Petition of the National Association of Attorneys General Telecommunications Subcommittee, supra, at 1.

15 Oncor advertises itself as "America's leading" competitor to AT&T, MCI, and Sprint, claiming it serves 600,000 hotel rooms and 200,000 pay phones nationwide, with 800 live and 400 robotic operators handling up to 400,000 calls a day using "state-of-the-art operations." Moss, No Encore for Oncor, New York Newsday, Feb. 12, 1995, at A17, col.3.

16 Operator Communications, Inc. dba Oncor Communications, Inc., Informational Tariff, filed Mar. 15, 1995, which replaced its previous Informational Tariff, as amended, Dec. 16, 1994. Oncor also has filed two tariffs pursuant to Section 203 of the Act and Part 61 of the Commission's Rules, i.e., Operator Communications, Inc. dba Oncor Communications, Inc. Tariff F.C.C. No. 1 (effective Jan. 26, 1993, as amended effective Dec. 16, 1994), governing provision of its international services, which includes OSP rates and charges; and Tariff F.C.C. No. 2 (effective Dec. 4, 1994), applicable to domestic interstate services, which does not include its OSP rates and charges.

17 See letter from Mitchell F. Brecher to Thomas Wyatt, Chief, Formal Complaints and Investigations Branch (Dec. 5, 1994) at 3.

18 Section 226 (h)(1)(A) provides that every OSP shall file and

> maintain, update regularly, and keep open for public inspection, an informational tariff specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator

7. In the past three years, the number of informal complaints that the Commission has received concerning Oncor's rates and charges has nearly quadrupled.[19] In 1994, the Commission received more than a thousand complaints directed against Oncor. Of these, more than 800 concerned its rates for operator services. A formal complaint against Oncor's charges has also been filed jointly by the states of Alabama and Mississippi.[20] In recent months, Illinois, several other states, and the District of Columbia have investigated or are investigating complaints about the level of Oncor's rates.[21] The high level of complaints, the level of charges imposed by Oncor, and a significant number of Congressional inquiries[22] raised

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services are provided. Any changes in such rates, terms, or conditions shall be filed no later than the first day on which the changed rates, terms, or conditions are in effect.

47 U.S.C. § 226(h)(1)(A).

In lieu of an informational tariff filed pursuant to Section 226 of the Act, some OSPs have opted to file traditional tariffs pursuant to Section 203(a) of the Act and Part 61 of the Commission's Rules, 47 C.F.R. §§ 61.1-61.172.

19 The Commission received more than 1,024 complaints directed against Oncor in 1994, more than 850 of which concerned its OSP rates. In 1992, the Commission received some 311 complaints, of which at least 219 were directed against Oncor's rates. The data may be even more revealing on a fiscal year basis. In FY-1994, the Commission received some 705 complaints directed against Oncor's OSP rates, compared to approximately 143 in FY-1992.

20 Alabama Public Service Commission and Mississippi Public Service Commission v. Operator Communications, Inc., dba Oncor Communications, Inc., File No. E-95-20.

21 See Moss, No Encore for Oncor, supra, at A7, col. 2. We note that with respect to intrastate competitive OSP services, state regulation has varied from prohibiting competitive OSP services altogether to allowing such services on an unregulated basis. Many states have prohibited Premise-Imposed Fees. States regulating OSP rates have often imposed a ceiling based on the highest rate charged by a facilities-based interexchange carrier or based on the dominant carrier's Time-of-Day charges.

22 See, e.g., letter from Honorable Russ Feingold to Kathie Kneff (March 2, 1995), Informal Complaint File No. IC-95-07921 (asking for an update on an investigation by the Bureau's Informal Complaints Branch of apparent excessive rates billed to his constituents by Oncor); letter from Honorable Olympia J. Snowe to

serious questions about its compliance with the Communications Act and prompted the Bureau's Enforcement Division formally to notify Oncor that the Bureau had initiated this investigation into the rates and charges applicable to Oncor's interstate operator assisted services.[23] The Bureau expressed its concern that those charges, including aggregator and miscellaneous surcharges assessed by Oncor, appeared to be unjust and unreasonable and thus unlawful under Section 201(b) of the Communications Act.[24] Unless Oncor promptly amended its tariff to substantially reduce its rates and related charges, Oncor was advised that it would "be expected to fully justify apparent excessive charges and surcharges resulting from application of [its] current tariff structure."[25] Further, particularly if it did not substantially reduce its rates, Oncor was advised to be prepared to address why the Commission should not issue an Order to Show Cause directing Oncor to disclose immediately to the consumer, at no charge to the consumer, and before charges are assessed, additional information about its rates.[26]

8. Following an informal conference with Bureau staff on December 9, 1994, Oncor amended its tariff on December 16, 1994, to cap aggregate and miscellaneous surcharges applicable to Interstate Directory Assistance at $1.00 per call. Oncor also capped interstate operator-assisted calls of one minute or less at $5.95.[27]

IV. DISCUSSION

9. Oncor's maximum interstate OSP rates substantially exceed those of AT&T's OSP rates for comparable services in every instance and often by as much as three or four times when various associated commissions and surcharges are applicable.[28] A

Lauren J. Belvin (Oct. 5, 1994) (forwarding letter from Douglas S. Rogers; Informal Complaint File No. IC-95-00044).

23 Letter from Gregory A. Weiss, Acting Chief, Enforcement Division, to Elisa Zafrani (Nov. 23, 1994) (copy attached as Appendix A).

24 Id. at 1.

25 Id. at 1-2.

26 Id. at 2.

27 Oncor Informational Tariff (effective Dec. 16, 1994) at 35. The record does not indicate that Oncor's calls of one minute or less are a significant percentage of its total calls.

28 See Appendix B, hereto.

cursory review of the informal complaints filed with the Commission reveals that consumers have often been charged exorbitant rates by Oncor for interstate telephone calls. For example, one consumer was billed $15.50 for a five minute call, as well as $7.42 for a two minute call.[29] In another complaint, Oncor charged a consumer as much as $8.51 for a two minute call and $9.58 for a three minute call.[30] Oncor has indicated that its aggregator surcharges are as high as $10.00 and sometimes account for nearly half the cost of a call.[31] According to Oncor, its costs are much higher than AT&T's.[32] However, it does not appear that all such costs are necessarily reasonable even if Oncor were able to show, as it claims, that it does not "make any more than AT&T does as percentage of revenue."[33] We note that a broad-based industry coalition has proposed a rate ceiling of $3.75 to end users, including all surcharges, premises-imposed fees and other charges for any one minute collect, calling card or third party call, without regard to such factors as time-of-day, distance, automated or live, calling card or collect, whereas under Oncor's tariff, its maximum rate, including so-called "aggregator surcharges," for any operator-assisted call of one minute or less might be as high as $5.95.[34]

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29 See, e.g., letter from Joseph Porcoro to Federal Communications Commission (Feb. 7, 1995), Informal Complaint File No. IC-95-08518.

30 See, e.g., letter from Harry E. Hasselmann to Federal Communications Commission (Feb. 10, 1995), Informal Complaint File No. 95-08517.

31 See, e.g., letter from Judith M. de Grandpre, Manager, Regulatory Affairs, to Kathie Kneff (Jan. 3, 1995), Informal Complaint File No. IC-94-17525; letter from Judith M. de Grandpre to Kathie Kneff (Jan. 17, 1995), Informal Complaint File No. IC-94-13622; letter from Judith M. de Grandpre to Kathie Kneff (Jan. 25, 1995), Informal Complaint File No. IC-94-16596.

32 An Oncor official is reported to have stated that Oncor's costs are higher than those of AT&T, in part, because it has to offer pay phone owners better deals to woo them away from AT&T. Pearl, Small Carriers Seek Price Cap for Pay Phones, The Wall Street Journal, Mar. 8, 1995, at B1, col. 6.

33 Moss, No Encore for Oncor, supra, at A7, col. 3.

34 See Rate Ceiling Alternative to Billed Party Preference (enclosure to letter from Genevieve Morelli to William F. Caton (March 8, 1995) at 8 (Ex Parte Communication, CC Docket No. 92-77); Oncor's OSP Informational Tariff (effective December 16, 1994) at 35. Some consumers have complained that they were charged in excess of $6.00 for a one minute telephone call. See, e.g., letter

10. In view of the foregoing, it does not appear that Oncor's charges, practices, classifications, and regulations for and in connection with its interstate operator services, taken as a whole, particularly its maximum charges, are just and reasonable as mandated by Section 201(b) of the Communications Act.[35] Accordingly, we are directing Oncor to reduce substantially those rates to levels more in line with those generally prevailing in the OSP industry or to show cause why those rates are not unlawful. In this connection, using AT&T's operator services' rates and charges as a form of surrogate for regulatory scrutiny, for every rate or charge, including surcharges, and miscellaneous fees covered by Oncor's tariffs, we generally will forbear from challenging those that do not exceed those of AT&T, for a comparable OSP service, by more than 15 percent. As the Commission stated in the TOCSIA Final Report, "Congress noted AT&T's rates are not necessarily the benchmark for the reasonableness of the rates of other OSPs as the other OSPs may have different costs."[36] However, the Commission also noted that the rates charged by AT&T, as well as by MCI and Sprint, "do provide a useful point of reference in making price comparisons" because those carriers handle the largest proportion of away-from-home calls and are the rates that most consumers pay.[37] We compared Oncor's rates to those of AT&T because MCI and Sprint's operator services rates were identical, in the respects compared, to those of AT&T and because consumers that complain about the high level of Oncor's rates generally compare them to those of AT&T, MCI or Sprint for comparable operator services. We believe such price ceiling, in combination with

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from Anthony Parisi to Federal Communications Commission (Sept. 3, 1994), Informal Complaint File No. IC-94-16737; letter from M. Elizabeth Ault to Chief, Informal Complaints (Aug. 20, 1994), Informal Complaint File No. IC-94-10062; letter from Patricia Murdy to New Hampshire Public Utilities Commission (Aug. 29, 1994), Informal Complaint File No. IC-94-16596.

35 Section 201(b) of the Act provides, in pertinent part, as follows:

> All charges, practices, classifications, and regulations for and in connection with [interstate or foreign communication by wire or radio] shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful . . . .

47 U.S.C. § 201(b).

36 TOCSIA Final Report, supra, at 19 n.38.

37 Id.

branding requirements the Commission has imposed or may impose on Oncor's right to operate as an interstate OSP pursuant to Section 214 of the Act[38] and Section 63.07(a) of the Commission's Rules,[39] and competitive market forces should generally suffice to ensure that Oncor's rates will be just and reasonable.

11. Should Oncor seek to maintain, rather than reduce, any rate or charge that exceeds the price ceiling, we shall require it to justify fully its rates and charges. In that connection, Oncor must specify its fully allocated costs of providing such service and its rate of return with respect to such services. In calculating such costs, Oncor must adhere to, to the extent possible, and fully explain and justify any deviation from, the definitions, accounting and methodology contained in the Uniform System of Accounts (USOA).[40] The test period shall include the revenues, expenses, and investment for calendar year 1994. All non-regulated activities and transactions with companies affiliated with Oncor's principals shall be fully explained and treated for accounting purposes in accordance with Parts 32 and 64 of the Commission's Rules. Such costs should include only *reasonable* payments made by Oncor to other common carriers, aggregators, and all others that are relevant to providing the particular service. On the other hand, all charges, surcharges, fees, miscellaneous payments, taxes and other payments by consumers paid directly or indirectly to entities other than Oncor shall be excluded. In furnishing any fully allocated costs of its current rates and charges, Oncor shall include working papers, as well as cost, marketing, and other data underlying such work papers. All statistical studies shall be submitted and supported in the form prescribed in Section 1.363 of the Commission's Rules.[41] The information called for herein shall be complete, accurate, consistent with Commission Rules, submitted under oath or affirmation, and in suitable form to serve as Oncor's direct case in the event that its rates are formally

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38 Section 214(a) of the Act provides, inter alia, that no carrier shall operate over any interstate line unless it shall first have obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such operation. 47 U.S.C. § 214(a).

39 Section 63.07(a) of the Rules provides that "any party that would be a non-dominant domestic interstate communications common carrier is authorized to provide domestic, interstate services to any domestic point and to ... operate any transmission line as long as it obtains all necessary authorizations from the Commission for use of radio frequencies." 47 C.F.R. § 63.07(a).

40 47 C.F.R. §§ 32.1 - 32.7990.

41 47 C.F.R. § 1.363.

designated for hearing or the Commission prescribes rates pursuant to Section 205 of the Act.[42]

12. The Commission's expectation in 1992 was that its branding requirements and consumers' ability to exercise choice and to dial-around an OSP whose rates appeared excessive would "help counter any residual market impact of the diminishing segment of the operator service industry that charges unusually high rates."[43] This expectation was based on the premise that, given the availability of sufficient information, consumers would make informed choices. However, the high level of complaints directed against Oncor's rates indicates that additional branding requirements should be imposed on it in order that consumers may be informed more fully of Oncor's interstate OSP rates and charges. Therefore, we are directing Oncor to implement as soon as possible, but no later than seven days from the release of this Order, the message specified in Appendix C, hereto. If, after 30 days after the release of this Order, Oncor does not reduce its rates to 115 percent of AT&T's rates, we direct Oncor, as an interim measure, to show cause why consumers should not be alerted that (1) Oncor's rates might be higher than the consumer may think; (2) Oncor's rates are under investigation by the FCC; and/or (3) the consumer may be assessed a surcharge of up to $10.00 per call.

V. FILING REQUIREMENTS

13. Oncor is directed to file tariff revisions within 30 days of the release of this Order if it chooses to make the reduction described in paragraph 10, above. If Oncor chooses not to make that reduction, we direct it to file the information required by paragraph 11, above, not later than 60 days after release of this Order. Oncor must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. Oncor shall include the file number of this proceeding on the cover sheet to its filing. Oncor is directed to file an original and four copies of all materials that it submits in this proceeding to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554.

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42 Section 205 of the Act authorizes the Commission to prescribe, inter alia, just and reasonable maximum charges whenever, after full opportunity for hearing, it shall be of the opinion that any charge, classification, regulation, or practice of any carrier violates any provisions of the Act. 47 U.S.C. § 205.

43 TOCSIA Final Report, supra, at 31.

VI. ORDERING CLAUSES

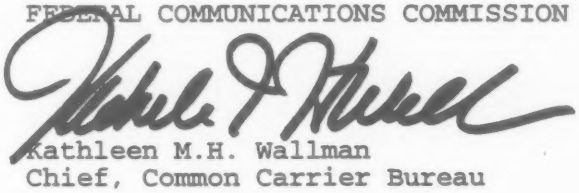
14. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i) and (j), 201, 205, 218, 226 and 403 of the Communications Act of 1934, as amended, §§ 151, 154(i),(j), 201, 205, 218, 226, 403, and authority delegated under 47 C.F.R. § 0.291, that Operator Communications, Inc., dba Oncor Communications, Inc., shall, as soon as possible but no later than seven days from the release of this Order, disclose to the consumer, at no charge to the consumer, and before charges are assessed, the message in Appendix C during the pendency of this proceeding.

15. IT IS FURTHER ORDERED that Oncor SHALL REDUCE its rates and charges for the provision of interstate operator services or fully demonstrate that those rates are just and reasonable within 60 days from the release this Order.

16. IT IS FURTHER ORDERED that Oncor SHALL FILE any information required under paragraph 11, above, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established herein.

17. IT IS FURTHER ORDERED that if Oncor's rates and charges exceed 115 percent of AT&T's rates for comparable services, Oncor IS DIRECTED TO SHOW CAUSE, within 30 days from the release of this Order, why it should not be required to disclose additional information to consumers in accordance with paragraph 12, herein, should it not reduce its rates.

FEDERAL COMMUNICATIONS COMMISSION



Kathleen M.H. Wallman
Chief, Common Carrier Bureau

APPENDIX A

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Federal Communications Commission
Washington, D.C. 20554

November 23, 1994

Ms. Elisa Zafrani
Oncor Communications, Inc.
6707 Democracy Boulevard
Bethesda, Maryland 20817

Re: Oncor Communications, Inc.
Investigation of OSP Charges
File No. ENF 95-02

Dear Ms. Zafrani:

As you are aware, this Commission has received, and continues to receive, numerous complaints about charges billed on behalf of Oncor Communications, Inc. ("Oncor") as an operator service provider ("OSP"). See, e.g., Letter from Honorable Olympia J. Snowe to Lauren J. Belvin (Oct. 5, 1994) (forwarding letter from Douglas S. Rogers; Informal Complaint File No. IC-95-00044). The high level of complaints and the level of charges imposed by Oncor raise serious questions about your company's compliance with the Communications Act.

This is to advise Oncor and its affiliated companies that the Common Carrier Bureau has initiated an investigation into the rates and charges applicable to Oncor's interstate operator assisted services. Initially, the investigation's principal focus will be on the rates, charges and related commissions, surcharges and fees applicable to Oncor's directory assistance services. The Bureau is particularly concerned that those charges, including aggregator and miscellaneous surcharges assessed by your company, appear to be unjust and unreasonable and thus unlawful under Section 201(b) of the Communications Act of 1934, as amended, 47 U.S.C. §201(b).

Accordingly, we are scheduling a conference for December 9, 1994, at 10:00 a.m. in Suite 10 of our 1250 23rd Street, N.W. Washington offices. The purpose of this conference, which will be informal and off-the-record, will be to explore whether your company will voluntarily and promptly file appropriate tariff schedules substantially reducing its rates and related charges as governed by the "Informational Tariff," effective November 16, 1993, filed with this Commission by Operator Communications, Inc. (formerly International Telecharge, Inc.) dba ONCOR Communications, Inc. Please be prepared to detail the nature of tariff revisions your company plans to file, and how soon such revisions may be expected. In the absence of such reductions, your company will be expected to fully justify apparent excessive

This action is taken pursuant to Sections 4(i), 205, 218 and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 205, 218, 403, and Section 0.204(d) of the Commission's Rules, 47 C.F.R. § 0.204(d), and authority delegated in Section 0.291 of the Rules. All information and documents submitted in response to this order shall reference **File No. ENF-95-02** and be directed to the attention of Thomas Wyatt, Chief, Formal Complaints and Investigations Branch.

Sincerely,

Gregory A. Weiss
Acting Chief
Enforcement Division
Common Carrier Bureau

cc: Gregory M. Casey
Jerry G. Kirby

APPENDIX B

COMPARISON OF INTERSTATE OPERATOR SERVICE RATES OF AT&T AND ONCOR

The rate comparison herein is based on Oncor's original Informational Tariff, as amended December 16, 1994. On March 15, 1995, Oncor replaced that tariff with another Informational Tariff that sets forth discrete rates rather than merely a minimum and maximum range of rates.[1] The latter tariff filing had no impact, however, on the minimum and maximum rates depicted in the following rate comparison.

No meaningful comparison can be made using Oncor's and AT&T's tariffed rates. AT&T's market-segmented rate structure is far more detailed than Oncor's. Further, AT&T's rates frequently fluctuate, rendering any comparison merely a "snapshot" view. For these reasons, the following material should be considered illustrative, and merely a demonstration of the difficulty in comparing two widely disparate rate structures. In the end, the only valid comparison is one between billed charges made by these carriers for comparable services.

---

1 Oncor also added a new rate element, "Billed to Third Party," with discrete rates spanning the range of its "Operator/Station Collect" rate element.

Rate Comparison for Operator-Dialed Calling Card Station

Note: This document was produced using rates in effect on February 21, 1995.

	DAY	DAY	DAY	DAY	DAY	DAY	EVE.	EVE.	EVE.	EVE.	EVE.	EVE.	NIGHT	NIGHT	NIGHT	NIGHT	NIGHT	NIGHT
	ONCOR		AT&T	ONCOR		AT&T	ONCOR		AT&T	ONCOR		AT&T	ONCOR		AT&T	ONCOR		AT&T
Mileage	Initial Min	Initial Min	Initial Min	Addl. Min.	Addl. Min.	Addl. Min.	Initial Min.	Initial Min.	Initial Min.	Addl. Min.	Addl. Min.	Addl. Min.	Initial Min.	Initial Min.	Initial Min.	Addl. Min.	Addl. Min.	Addl. Min.
	Min	Max		Min.	Max		Min.	Max		Min.	Max		Min.	Max		Min.	Max	
1-10	0.1620	0.6600	0.2500	0.1530	0.6600	0.2500	0.1085	0.6600	0.1500	0.1025	0.6600	0.1500	0.0900	0.6600	0.1300	0.0878	0.6600	0.1300
11-22	0.1800	0.6600	0.2500	0.1800	0.6600	0.2500	0.1266	0.6600	0.1600	0.1026	0.6600	0.1600	0.1017	0.6600	0.1300	0.0990	0.6600	0.1300
23-55	0.1890	0.6600	0.2600	0.1800	0.6600	0.2600	0.1387	0.6600	0.1800	0.1327	0.6600	0.1800	0.1080	0.6600	0.1400	0.1080	0.6600	0.1400
56-124	0.1980	0.6600	0.2700	0.1935	0.6600	0.2700	0.1387	0.6600	0.1800	0.1327	0.6600	0.1800	0.1080	0.6600	0.1500	0.1080	0.6600	0.1500
125-292	0.1980	0.6649	0.2700	0.1935	0.6649	0.2700	0.1387	0.6649	0.1900	0.1387	0.6649	0.1900	0.1094	0.6649	0.1600	0.1094	0.6649	0.1600
293-430	0.2070	0.6784	0.2900	0.2070	0.6784	0.2900	0.1422	0.6784	0.1900	0.1387	0.6784	0.1900	0.1125	0.6784	0.1600	0.1103	0.6784	0.1600
431-925	0.2160	0.6798	0.2900	0.2160	0.6798	0.2900	0.1424	0.6798	0.2000	0.1424	0.6798	0.2000	0.1170	0.6798	0.1600	0.1134	0.6798	0.1600
926-1910	0.2250	0.6900	0.2900	0.2250	0.6900	0.2900	0.1424	0.6900	0.2000	0.1424	0.6900	0.2000	0.1193	0.6900	0.1700	0.1170	0.6900	0.1700
1911-3000	0.2250	0.6900	0.2900	0.2250	0.6900	0.2900	0.1424	0.6900	0.2200	0.1424	0.6900	0.2200	0.1215	0.6900	0.1800	0.1193	0.6900	0.1800
3001-4250	0.2790	0.6900	0.3200	0.2700	0.6900	0.3200	0.1869	0.6900	0.2300	0.1809	0.6900	0.2300	0.1485	0.6900	0.1800	0.1440	0.6900	0.1800
> 4250	0.2970	0.6900	0.3500	0.2880	0.6900	0.3500	0.1990	0.6900	0.2400	0.1930	0.6900	0.2400	0.1575	0.6900	0.1900	0.1530	0.6900	0.1900

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Rate Comparison for Customer-Dialed Calling Card Station

	DAY	DAY	DAY	DAY	DAY	DAY	EVE.	EVE.	EVE.	EVE.	EVE.	EVE.	NIGHT	NIGHT	NIGHT	NIGHT	NIGHT	NIGHT
	ONCOR		AT&T	ONCOR		AT&T	ONCOR		AT&T	ONCOR		AT&T	ONCOR		AT&T	ONCOR		AT&T
Mileage	Initial Min	Initial Min	Initial Min	Addl. Min.	Addl. Min.	Addl. Min.	Initial Min.	Initial Min.	Initial Min.	Addl. Min.	Addl. Min.	Addl. Min.	Initial Min.	Initial Min.	Initial Min.	Addl. Min.	Addl. Min.	Addl. Min.
	Min	Max		Min.	Max		Min.	Max		Min.	Max		Min.	Max		Min.	Max	
1 - 10	0.1620	0.6600	0.2300	0.1530	0.6600	0.2300	0.1085	0.6600	0.1700	0.1025	0.6600	0.1700	0.0900	0.6600	0.1600	0.0878	0.6600	0.1600
11 - 22	0.1800	0.6600	0.2500	0.1800	0.6600	0.2500	0.1266	0.6600	0.1800	0.1026	0.6600	0.1800	0.1017	0.6600	0.1600	0.0990	0.6600	0.1600
23 - 55	0.1890	0.6600	0.2800	0.1800	0.6600	0.2800	0.1387	0.6600	0.2000	0.1327	0.6600	0.2000	0.1080	0.6600	0.1700	0.1080	0.6600	0.1700
56 - 124	0.1980	0.6600	0.2800	0.1935	0.6600	0.2800	0.1387	0.6600	0.2000	0.1327	0.6600	0.2000	0.1080	0.6600	0.1700	0.1080	0.6600	0.1700
125 - 292	0.1980	0.6649	0.3000	0.1935	0.6649	0.3000	0.1387	0.6649	0.2000	0.1387	0.6649	0.2000	0.1094	0.6649	0.1700	0.1094	0.6649	0.1700
293 - 430	0.2070	0.6784	0.3000	0.2070	0.6784	0.3000	0.1422	0.6784	0.2100	0.1387	0.6784	0.2100	0.1125	0.6784	0.1800	0.1103	0.6784	0.1800
431 - 925	0.2160	0.6798	0.3100	0.2160	0.6798	0.3100	0.1424	0.6798	0.2200	0.1424	0.6798	0.2200	0.1170	0.6798	0.1800	0.1134	0.6798	0.1800
926 - 1910	0.2250	0.6900	0.3100	0.2250	0.6900	0.3100	0.1424	0.6900	0.2300	0.1424	0.6900	0.2300	0.1193	0.6900	0.1900	0.1170	0.6900	0.1900
1911 - 3000	0.2250	0.6900	0.3100	0.2250	0.6900	0.3100	0.1424	0.6900	0.2400	0.1424	0.6900	0.2400	0.1215	0.6900	0.1900	0.1193	0.6900	0.1900
3001 - 4250	0.2790	0.6900	0.3300	0.2700	0.6900	0.3300	0.1869	0.6900	0.2400	0.1809	0.6900	0.2400	0.1485	0.6900	0.2000	0.1440	0.6900	0.2000
> 4250	0.2970	0.6900	0.3600	0.2880	0.6900	0.3600	0.1990	0.6900	0.2500	0.1930	0.6900	0.2500	0.1575	0.6900	0.2100	0.1530	0.6900	0.2100

Rate Comparison for Operator Services

Note: This document was produced using rates in effect on February 21, 1995.

Service	ONCOR		AT&T
	Min./Call	Max./Call	Per Call
Person-to-Person	$3.50	$5.00	$4.50
Operator Station/Collect	$1.88	$3.75	$2.10
Direct Entry Calling Card	$0.80	$2.75	$0.80
Operator-Dialed Service Charge	$0.75	$1.25	$1.00
Directory Assistance	$0.65	$1.55	$0.75

Other ONCOR Charges for which no Equivalent AT&T Charge Exists:

Charge	ONCOR		
	Min./Call	Max./Call	
Aggregator Surcharges	$0.00	$10.00	(Excludes mobile and marine station calls.)
Miscellaneous Surcharges	$0.00	$10.00	

Note: Total surcharges may not exceed $10.00/call, excluding mobile and marine station calls. For Directory Assistance Calls, total surcharge shall not exceed $1.00.

Also, the maximum charge for any operator-assisted call for which the duration is one minute or less, will not exceed $5.95.

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APPENDIX C

BRANDING AND INFORMATION DISCLOSURE REQUIREMENTS FOR ONCOR'S INTERSTATE OSP SERVICES

In addition to the branding requirements specified by Commission rule, Oncor shall disclose to the consumer, at no charge to the consumer, and before charges are assessed, the following message:

> "The rates that you will be charged for this call are available on request. Please dial [insert number] to obtain these rates."[1]

---

1 Oncor must clearly describe the dialing sequence for obtaining the rate information. For example, the message should clearly direct callers to dial "0," "00," or whatever dialing sequence is required in order to obtain immediately rate information.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 95-255

In the Matter of	)	
	)	
Replacement of Part 90 by Part 88 to	)	
Revise the Private Land Mobile Radio	)	
Services and Modify the Policies	)	
Governing Them	)	
	)	PR Docket No. 92-235
and	)	
	)	
Examination of Exclusivity and	)	
Frequency Assignment Policies of	)	
the Private Land Mobile Radio Services	)	

REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: June 15, 1995 **Released: June 23, 1995**

Comment Date: September 15, 1995
Reply Comment Date: October 16, 1995

By the Commission:

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I. INTRODUCTION

1. By this action, we resolve many of the technical issues which have inhibited private land mobile radio (PLMR) users from employing the most spectrally-efficient technologies. Specifically, we adopt extensive rule changes to the PLMR services[1] which will promote highly effective and efficient use of the PLMR spectrum and facilitate the introduction of advanced technologies into the private mobile services. The rules we adopt

[1] This proceeding primarily addresses the PLMR services licensed under subparts B, C, D, and E of Part 90 of the Commission's Rules, 47 C.F.R. Part 90; that is, those licensed in the 150-174, 421-430, 450-470, and 470-512 MHz frequency bands. Since the changes do not affect the private mobile services above 800 MHz, we refer to these frequency bands as "below 800 MHz" or "refarming bands" for convenience. Additionally, the terms "private mobile" and "private wireless" or "PLMR" are interchangeable for the purposes of this proceeding.

today establish a new channelling plan and provide technical flexibility which will enable private wireless users to make equipment investment decisions to accommodate their diverse needs. We have also made certain modifications to our regulatory and technical framework for the PLMR services and have incorporated those rule modifications into Part 90 of the Commission's Rules. Consequently, we have decided not to replace Part 90 of the Commission's Rules, 47 C.F.R. Part 90, with Part 88 at this time.

2. Our primary goal in this proceeding has been to develop an overall strategy for using the spectrum in the PLMR allocations more efficiently to meet future communications requirements. This is an era of unparalleled advances in mobile radio technology. It is also an era of unparalleled demand for radio spectrum to provide the exciting array of new wireless services. Because of the many special characteristics of the private radio services, such as spectrum sharing and no-cost spectrum use, it has been particularly difficult to encourage spectrum efficiency in these bands. We seek, in this proceeding, to ensure the provision of essential private wireless services, and to provide marketplace incentives to enhance spectrum efficiency so as to satisfy PLMR demand well into the 21st century. Realizing this goal has proven to be complex because this proceeding attempts to introduce new technologies and regulations into heavily-licensed, shared spectrum. Also, many licensees, such as public safety entities, have special communications needs. Further, in many cases, the new assignments in these bands are needed by the same group of users that are being displaced. In this regard, we note that the spectrum in the frequency bands under consideration in this proceeding supports over 12 million transmitters with an aggregate value of $25 billion dollars.[2] We believe that the changes we make today represent a significant first step towards establishing a technical and policy framework for the PLMR service that will permit and encourage more efficient use of the spectrum and help chart the course to meet the future demand for private wireless services.

3. In sum, the decisions made in this proceeding represent reforms that introduce regulatory flexibility and seek to introduce marketplace forces into the private wireless environment. In reaching the decisions that are set forth in this item, we have been guided by the following objectives:

> (1) to provide technical flexibility which enhances deployment of new technologies and promotes a competitive and robust marketplace for product development;
>
> (2) to provide a regulatory structure which allows private licensees and equipment manufacturers the opportunity to introduce new applications and enhancements to existing services;

---

[2] Letter from User Associations to William F. Caton, Federal Communications Commission (p. 5), dated January 13, 1995.

(3) to create policies which address the diverse communications requirements of the wide array of large and small private wireless users and enable these licensees to make equipment investment decisions which best satisfy their business needs; and

(4) to create incentives to encourage the efficient and intensive use of the spectrum and to ensure that users recognize the opportunity cost of inefficient spectrum use.

4. In the Further Notice of Proposed Rule Making (FNPRM) section of this item we seek to determine how certain market-based incentives such as exclusivity with the right to lease excess capacity, spectrum user fees, and/or competitive bidding can be introduced into these PLMR bands to promote more efficient use of this spectrum. The introduction of these market-based tools will provide users with appropriate incentives to employ the most advanced technology and maximize the efficient use of the spectrum. This proceeding has been a forum to conduct a comprehensive review of the private land mobile radio services. We believe that the further exploration of these initiatives is particularly important during this period of profound change in mobile radio. We acknowledge the longstanding tradition of private mobile radio services to provide for the safety and general welfare of the American populace and promote the economic vitality of this country's commerce and industrial structure. We note, however, that many private communications services can be successfully satisfied by third-party commercial carriers as evidenced by the success of specialized mobile radio (SMR) systems. In soliciting further comments on exclusivity, we explore several policy questions related to commercial-type activities, such as the leasing of excess capacity. In addition, we seek comment on the introduction of user fees, and/or competitive bidding to encourage spectrum efficiency.

II. EXECUTIVE SUMMARY

5. This proceeding commenced in order to explore options to promote the more effective and efficient use of the PLMR spectrum bands. Although, the immediate problem the Commission sought to address was frequency congestion, the Commission's broader objective was to develop a regulatory strategy which promotes more efficient use of the existing spectrum allocations to satisfy future private land mobile telecommunications requirements. Since this proceeding was initiated over four years ago much has changed in our approach to managing spectrum. In the Omnibus Budget Reconciliation Act of 1993 (Budget Act), Congress granted the FCC authority to use auctions to award spectrum licenses when mutually exclusive applications were received for initial licenses of subscriber-based services. Since receiving auction authority less than two years ago, the Commission has completed four auctions assigning 40 Narrowband Personal Communications Service (PCS) licenses, 594 Interactive Video Data Service (IVDS) licenses and 99 Broadband PCS licenses. We have determined that auctions spur the rapid introduction of a wide array of new products and services that will increase competition and bring lower prices for

consumers. As a result of our experience with auctions, we have concluded that using competitive bidding to award licenses, as compared with other licensing mechanisms, speeds the development and deployment of new services and encourages efficient use of the spectrum. In this regard, we note that auctions generally award licenses quickly, to those parties who value them the most highly and who are therefore most likely to introduce service rapidly to the public.[3]

6. Currently, the Commission does not have statutory authority to conduct auctions or impose user fees in the PLMR bands. However, the Administration's FY 1996 budget proposes that the Commission's authority to use competitive bidding be expanded. Expanded auction authority and the imposition of fees to encourage more efficient distribution and use of the spectrum underlies the budgetary assumptions in the FY 1996 Senate Budget Resolution.[4] User fees or competitive bidding may be appropriate to encourage greater spectrum efficiency and to ensure that the public receives a "fair return" for spectrum.[5] Therefore, we seek comment in the FNPRM on the use of market-based user fees and competitive bidding as tools to introduce market-based incentives into these private wireless bands. However, because public safety entities are charged with the protection of human life and property, we propose to exempt them from user fees and competitive bidding.

7. In order to achieve our objective of increasing the efficiency of the PLMR frequency bands, we adopt changes to our technical rules and seek comment on the introduction of certain market-based incentives as follows:

- We establish a narrowband[6] channel plan based on current channel centers.[7]

---

[3] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Competitive Bidding Second Report and Order, 9 FCC Rcd 2348, 2358 (1994).

[4] Senate Committee on Budget, Concurrent Resolution on Budget for FY 1996 to accompany S. Con. Res. 13, S. Rep. No. 104-82, 104th Cong., 1st Sess. 199-200 (1995).

[5] See letter from AT&T to William F. Caton, Federal Communications Commission, dated April 26, 1995 and letter from Linear Modulation Technology Limited to William F. Caton, Federal Communications Commission, dated May 16, 1995.

[6] In this document, narrowband or NB refers to channel spacings of 7.5 kHz in the VHF PLMR band and 6.25 kHz in the UHF PLMR bands, or channel bandwidths of 6.25 kHz or less in all PLMR bands unless specified otherwise. We will refer to NB technology or NB equipment to include all advanced technologies designed to operate with channel bandwidths of 6.25 kHz or less or equipment with 6.25 kHz equivalent efficiency such as TDMA (2 channels in 12.5 kHz or 4 channels in 25 kHz).

Technology that provides either narrowband or the equivalent efficiency will be allowed. We allow the flexibility of aggregating up to the equivalent of 4 NB channels provided that spectrum-efficient technology is employed (e.g. 4-TDMA in 25 kHz). This approach will enable users to employ the most spectrally-efficient technology available, while causing the least disruption to their own and other existing operations. This channeling plan establishes a channelization framework that is flexible, technology-neutral, and can easily be adapted to user fees or competitive bidding, if authority to use these mechanisms is obtained.

- Users will not be required to replace existing systems; rather, we will manage the transition to narrowband equipment by type accepting only increasingly efficient equipment over a ten-year period. Pursuant to this transition plan, after August 1, 1996 only equipment that operates with a 12.5 kHz or less channel bandwidth will be type accepted. However, multi-mode equipment that operates on 25 kHz channels will be allowed if it is also capable of operating on 12.5 kHz and/or narrower channels. Single mode equipment that operates on wider channels (up to 25 kHz), but which meets narrowband efficiency standards will also be allowed. After January 1, 2005, only equipment that operates on narrowband channel bandwidths will be type accepted. Multi-mode equipment that operates on 25 kHz and/or 12.5 kHz channels will be allowed if it is also capable of operating on 6.25 kHz or narrower channels. Similarly, single mode equipment that operates on wider channels (up to 25 kHz), but which meets narrowband efficiency standards will be allowed. This transition plan will provide users with maximum flexibility to continue using their existing equipment or employ the transitional 12.5 kHz equipment until a full line of affordable narrowband equipment is available. It also provides manufacturers with incentives to develop and market narrowband equivalent technology over a relatively short period.

- We also conclude that the PLMR service groups must be consolidated and that competition should be introduced into the coordinator services for each service group. Consolidation of the service groups will provide for more efficient allocation of the increased capacity created by the introduction of more efficient technology. We indicate that two to four broad categories, including one for Public Safety users, appears reasonable. We believe, however, that consolidation can be accomplished most effectively by providing the industry with three months to negotiate and submit a consensus consolidation proposal to the Commission. The consolidation plan should provide for competition among coordinators in each of the consolidated user

---

[7] Throughout a transition to narrowband technology, licensees will be permitted to remain on the frequencies on which they are currently licensed.

groups. If no acceptable consensus plan is submitted within the requisite time, the Commission will devise and adopt a service consolidation plan based on the record.

- We also propose various methods to introduce market forces into the PLMR bands. The proposals addressed in the FNPRM are intended to prepare the Commission and the private wireless users for a changing environment in which the economic value of private spectrum is recognized. Because this shared spectrum has historically been available at no charge to licensees, there has been little motivation for them to employ spectrum efficient techniques. To encourage and motivate the efficient use of this valuable public resource, the Commission will remove technical impediments to introducing spectrally-efficient technology and consider introducing market-based incentives such as exclusivity, the right to resell excess capacity, user fees and/or auctions into this spectrum.

III. BACKGROUND & HISTORY OF THIS PROCEEDING

8. In July 1991, we released a Notice of Inquiry (Refarming Inquiry)[8] because we noted that the number of licensed transmitters in these PLMR bands had grown dramatically, and we projected that the number of licensed PLMR transmitters would double between 1990 and 2000, and double again by 2010. In the Refarming Inquiry, we solicited comments on a diverse array of policy and technological proposals designed to improve spectrum efficiency in the PLMR bands below 800 MHz. We noted that at that time there were about 1.2 million stations and 12 million transmitters in those bands. The 12 million transmitters licensed in these bands constitute 66% of all of the nation's 18 million licensed PLMR transmitters.[9] We also noted that in many areas of the country, the demand for PLMR spectrum had been experiencing dramatic growth.[10]

9. In November 1992, we released a Notice of Proposed Rule Making (Refarming Notice) that built upon the information acquired during the inquiry stage and proposed extensive revisions in the PLMR bands below 800 MHz.[11] In the Refarming Notice, our goals were (1) to increase channel capacity in the PLMR bands below 800 MHz, (2) to

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[8] Notice of Inquiry, (Refarming Inquiry), PR Docket No. 91-170, 6 FCC Rcd 4126 (1991).

[9] See Final Land Mobile Radio Service Summary, March 13, 1994, p. 496.

[10] Notice of Inquiry, at 4127-4129.

[11] Notice of Proposed Rule Making, (Refarming Notice), PR Docket No. 92-235, 7 FCC Rcd 8105 (1992).

promote more efficient use of these channels, and (3) to simplify our rules.[12] We called for an overhaul of our policies governing the assignment principles for the PLMR services in bands below 800 MHz.[13] In the Refarming Notice, we sought to increase channel capacity and improve quality of service, without imposing unreasonable burdens on present and future licensees.[14] Finally, because the proposed rules were in many ways radically different from our current rules, we proposed to replace Part 90 with Part 88.

10. Specifically, in the Refarming Notice, we presented four major proposals designed to increase spectral efficiency, i.e., number of available channels, in the PLMR bands. First, we proposed spectrum efficiency standards that would quadruple channel capacity over a 10-20 year period by ultimately reducing channel spacing to 6.25 kHz or less, while at the same time providing technical flexibility. Second, we proposed a marketplace mechanism, "Exclusive Use Overlay," by which channels below 800 MHz would still be shared, but further assignments in those channels would be limited.[15] Third, we proposed consolidating the 20 PLMR services[16] into 3 frequency pools. Fourth, we recommended new technical and operational standards, including significantly reducing permissible power levels, permitting centralized trunking, and designating specific channels for new high-technology operations.[17]

11. In response to the Refarming Notice, we held two public forums[18] and received over 500 comments, 66 reply comments, 796 letters from Members of Congress, and several hundred other letters.[19] While there was disagreement with some of the proposals, based on

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[12] Refarming Notice at para. 1.

[13] The primary bands under consideration are shown in Appendix A, Figure 2.

[14] Refarming Notice at para. 6.

[15] This option includes a form of pseudo-exclusivity in that licensees can limit additional assignments from being made on a channel based on concurrence and loading criteria.

[16] Since the Notice was adopted, an additional radio service, the Emergency Medical Radio Service (EMRS), was added. This raised the number of radio services from 19 to 20.

[17] Refarming Notice at para. 6.

[18] The Private Radio Bureau, in cooperation with the Annenberg Washington Program, Communications Policy Studies, of Northwestern University, sponsored a conference on Refarming on November 14, 1991. Additionally, the Bureau held a Refarming Technology Roundtable on May 16, 1993.

[19] A list of commenters and reply commenters is given in Appendix B. The Notice's comment date was February 26, 1993. The reply comment date was April 14, 1993.

the broad range of comments and the information presented at the forums, the PLMR community generally supports our primary objective of making more efficient use of the spectrum below 800 MHz.[20] The Refarming Notice generated a great deal of comment and controversy, however, due to the extensive impact on existing private radio licensees. The user community generally agreed with our goals to reduce spectral occupancy but many opposed plans to implement a maximum 5 kHz or 6.25 kHz channel bandwidth. Many commenters also cautioned about the need to provide sufficient time, to avoid disruption to their operations, to achieve such a large reduction in channel bandwidth.[21] Further, virtually all commenters opposed the proposed restrictions on antenna height and transmitter power. Finally, there was no consensus relative to consolidation of radio services. On this point, many parties made suggestions and offered variations on our proposals for consolidation, including, but not limited to, the creation of service(s) for right-of-way companies,[22] public safety entities,[23] and certain industrial users which would be exempt or partially exempt from the Refarming Notice's exclusivity proposal.[24]

A. Recent Legislative and Regulatory Developments

12. On August 10, 1993, the Omnibus Budget Reconciliation Act was enacted.[25] That legislation established two categories of mobile services: commercial mobile radio service (CMRS) and private mobile radio service (PMRS). CMRS is defined as a mobile service that "is provided for profit and makes interconnected service available (A) to the public, or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." PMRS is defined as a mobile service that "is not a commercial mobile service or the functional equivalent of a commercial mobile service."[26] In response to the new statute, we instituted a series of rule makings to further define the distinction

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[20] LMCC, for example, stated that they are "in agreement with the fundamental intent and direction of improving efficiency...." Comments of LMCC at 3. See also Reply Comments of Motorola at i.

[21] Current PLMR channel bandwidth (excluding interstitial channels) is 25 kHz.

[22] Reply Comments of the American Petroleum Institute at 6-9.

[23] Reply Comments of the Public Safety Communications Council at 3.

[24] Specific comments upon proposals in the Refarming Notice including consolidation of services into three frequency pools, are discussed later in this document.

[25] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312, 392 (1993) (Budget Act).

[26] Communications Act, § 332(d), 47 U.S.C. § 332(d).

between commercial and private service providers. In the CMRS Second Report and Order,[27] the Commission outlined a three prong test for CMRS: (1) the service must be one "that is for profit," (2) the system must make "interconnected service" available, and (3) the service must be effectively available to a substantial portion of the public.[28] Pursuant to the directive in the Budget Act, existing private services were reviewed under the new statutory definitions. We specifically noted that public safety and governmental services, as well as businesses and other private entities who operate mobile systems exclusively for internal use, would not be considered "for-profit" services. We also indicated that, where a system is used only to serve a licensee's internal communications requirements rather than being offered with the intent of receiving compensation, such licensee is not providing service "for-profit" within the meaning of the statute.[29] Upon review, the Commission concluded, except for private carriers licensed in the Business Radio Service, that all private mobile licensees within the refarming bands are classified as PMRS since they are internal use systems and not available to a substantial portion of the public.

13. In addition to enacting new definitions for mobile services, the Communications Act in Section 309(j) provides the Commission with the authority to use competitive bidding procedures to choose among mutually exclusive applications for initial licenses.[30] At the same time, Section 309(j)(2)(A) requires that in order for competitive bidding to apply, the "principle use" of the spectrum must involve, or be reasonably likely to involve, the transmission or reception of communications signals to subscribers for compensation.[31] In the Competitive Bidding Second Report and Order, the Commission reviewed the applicability of competitive bidding for private services. We indicated that "private services" in the Section 309(j) auction context and "private mobile services" as defined in Section 332(d)(3) of the Communications Act are different from each other. In determining eligibility for competitive bidding, the term "private services" refers to services that do not involve the payment of compensation to the licensee by subscribers, i.e., that are for internal use; whereas, Section 332(d) distinguishes private versus commercial mobile services on the basis of several criteria, including whether interconnected mobile service is provided for a profit to the public or a substantial portion of the public. In the Competitive Bidding Second Report and Order, the Commission concluded that the private mobile services were not subject to competitive bidding because they failed the test for competitive bidding: the

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[27] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, CMRS Second Report and Order, Gen. Docket No. 93-252, 9 FCC Rcd 1411 (1994).

[28] CMRS Second Report and Order at para. 11.

[29] CMRS Second Report and Order at para. 44.

[30] Competitive Bidding Second Report and Order, 9 FCC Rcd at 2350.

[31] See also Competitive Bidding Second Report and Order at para. 30-32.

"principle use" of this PLMR spectrum was not subscriber based and, because the spectrum was shared, it did not involve mutually exclusive applications.[32] We note, however, that the Refarming Notice sought to introduce exclusivity into certain PLMR bands.

14. In the next section entitled "Report and Order," we address the PLMR rules that we are adopting regarding channelization, transition, consolidation of radio services, and technical parameters. In the section, "Further Notice of Proposed Rule Making," we discuss exclusivity and seek further comment on that topic and related matters, e.g., leasing of excess capacity.[33]

IV. REPORT AND ORDER

A. Introduction

15. By this action, we adopt extensive changes to the PLMR service rules.[34] These changes will promote the best use of the PLMR spectrum and stimulate introduction of advanced technologies into private mobile services. The rules adopted today: (1) establish a new channelling plan; (2) provide a flexible time frame in which private wireless users can make individual business decisions to accommodate their varied needs; (3) improve our regulatory and technical framework for the PLMR services; and, (4) mandate consolidation and suggest an initial framework for the consolidation of the 20 private radio services. We have decided to focus on those technical issues which most directly promote improvements in spectrum efficiency. We are not pursuing the more fundamental changes that would have resulted from the replacement of Part 90 with Part 88 at this time. Even the more limited changes adopted herein are considerable. Other proposed changes to Part 90 would have amended CMRS provisions. Rather than taking this additional action, we believe that the public would be best served by focusing on changes only to PLMR at this juncture and reassessing certain parts of our original proposals in future proceedings. Specifically, we are adopting rules to promote conversion to new efficient technologies. We are:

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[32] Competitive Bidding Second Report and Order at para. 13.

[33] As discussed earlier, we have decided that this Refarming proceeding would concentrate on major PLMR issues in the 150-174, 421-430, 450-470, and 470-512 MHz bands only. Any proposal that is not included in our discussion today, but was included in the original Refarming Notice is considered closed and is not to be considered part of the Further Notice of Proposed Rule Making adopted today.

[34] See supra note 1.

(1) Adopting a channel plan which permits the use of narrowband (NB) technologies,[35] but allowing wideband equipment that employs technology that is at least as spectrally efficient as narrowband equipment.

(2) Encouraging transition to spectrum-efficient technology by type accepting new efficient equipment and by not type accepting 25 kHz bandwidth equipment in one year unless its wideband operation meets a minimum efficiency standard or it is multi-mode.

(3) Specifying new technical standards (e.g., transmitter power, emission limitations, and frequency stability) that accommodate a wide range of technologies and products.

(4) Achieving consolidation of radio services by allowing three months for the industry to further consider and submit their views on a consolidation plan to the Commission.

B. Channelization

16. Proposal. The Refarming Notice set forth a complex set of changes by which the spectrum would be sub-divided from channels 15-30 kHz wide into narrowband (NB) channels.[36] We proposed that applicants be required to operate with NB technologies or,

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[35] Channels will be interleaved between current channels allowing existing assignments to remain on-channel. Thus, the channels in the VHF band at 150-174 MHz are spaced every 7.5 kHz, and the channels in the UHF bands at 421-430, 450-470, and 470-512 MHz are spaced every 6.25 kHz. However, channel bandwidths in all bands will be 6.25 kHz.

[36] Currently, PLMR channels are generally spaced as follows:

Frequency Band (MHz)	Channel Spacing (kHz)	
25-50	20	
72-76	20	(R/C Service operates on 10 kHz splits)
150-174	15	(5 kHz permitted on frequency offsets) (30 kHz for some business frequencies)
220-222	5	
421-430	25	
450-470	25	(low power permitted on 12.5 kHz offsets)
470-512	25	
806-821/851-866	25	
821-824/866-869	12.5	
896-901/935-940	12.5	

alternatively, be allowed to group NB channels together if their new system met certain minimum efficiency standards.[37] Specifically, at VHF, we proposed 5 kHz channel spacings for low power mobile frequencies in the 72-76 MHz band and for all frequencies in the 150-174 MHz band; at UHF we proposed 6.25 kHz channel spacings for the 421-430, 450-470, and 470-512 MHz bands. This proposal had two key components. First, existing systems would reduce their occupied bandwidths from 25-30 kHz to 10-12 kHz.[38] This would allow the spectrum to be "cultivated" by new, more efficient technologies. Second, licensees would be required to replace their systems with new NB equipment and shift their frequencies to align with the new channeling plan.

17. Comments. Although the majority of the comments agreed that efficiency should be increased in the bands below 800 MHz, most disagreed with our proposal regarding channelization. Generally, commenters opposed the proposals to shift operating frequencies and to reduce the frequency deviation of current radios. Commenters generally opposed our proposed frequency spacings for all bands, but were not in agreement on what the spacing should be.

18. Commenters opposing the requirement to shift[39] their operating frequency claimed it would seriously hamper the migration process by inhibiting forward and backward compatibility[40] between systems. APCO states that "[a]n offset channel plan ... would essentially make all existing equipment obsolete, due to incompatible synthesizers."[41] Safety-related services also argue that shifting frequencies could result in serious interference to critical functions due to confusion regarding operating frequencies.

19. Many opposing the proposal indicate that existing equipment cannot be easily modified to operate with bandwidths of 10-12 kHz. Commenters state that a reduction in the frequency deviation of existing equipment without a corresponding change in the receiver will be ineffective. TIA asserts that "... reduced deviation in the transmitter requires

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[37] As proposed, narrowband (NB) refers to channel spacings of 5 kHz in the VHF band and 6.25 kHz in the UHF bands and occupied bandwidths of 4 and 5 kHz, respectively; wider channels can be used provided that such use is as efficient as narrowband technology.

[38] We proposed that the frequency deviation of existing equipment be reduced by January 1, 1996.

[39] Many commenters refer to the proposal to shift their operating frequency as an offset frequency plan.

[40] Forward and backward compatibility enables new equipment to communicate with existing as well as future equipment. For example, commenters claim new 12.5 kHz equipment could be compatible with existing 25 kHz and future 6.25 or 5 kHz equipment.

[41] Comments of APCO at 8.

additional audio gain in the receiver ..." TIA also says that system range will be reduced and "[m]erely reducing deviation does not improve transmitter stability to that of a true 12.5 kHz unit."[42] In its comments Ericsson states, "[t]he reduction in transmitter deviation of standard 25 kHz or 30 kHz transmitters leaves the receivers in such equipment exposed to interference..." and, "[t]he only way to avoid the interference is to replace components on the receiver at the same time the transmitter deviation is reduced."[43] Finally, Motorola states that "... without a corresponding reduction in receiver selectivity, new operations introduced on the newly created adjacent channels will cause an almost twenty fold increase in adjacent channel interference to current users, even if 6.25 kHz or 5 kHz equipment is deployed."[44] Motorola also states that, "[a]ny significant improvements in spectral efficiency must come through the deployment of new equipment."[45]

20. Thus, commenters indicate that to meet the proposed requirements, systems may have to be changed-out twice in 10-13 years; first to comply with the reduced frequency deviation requirement, and second, to comply with the narrowband channel spacing. Otherwise, they would have to change-out their systems once and prematurely implement NB technology. Many public safety and safety-related groups, such as railroads, oppose implementation of NB systems until (1) a full line of equipment is available including portables, (2) the technology is proven under field conditions, particularly in urban environments, and (3) a migration plan can be developed to ensure a smooth transition from current FM analog-based platforms to newer, digital-based technologies. Consequently, many users request that existing licensees be permitted to stay on their current frequency assignment ("on-channel") and convert to true 12.5 kHz technologies before proceeding to NB systems.

21. Many commenters presented plans recommending channel spacings of 2.5, 5, 6.25, 7.5, or 12.5 kHz. LMCC submitted a UHF channelization plan of 12.5 kHz channel spacing and two options at VHF: option A suggests implementing 12.5 kHz equipment by 2004 and option B suggests implementing 6.25 kHz equipment by this same date. LMCC further suggests that 6.25 kHz channel spacing at UHF be the subject of a future rule making.[46] Motorola, in favor of 12.5 kHz channelization, points out that "[t]he transition to true 12.5 kHz will provide significant improvements in spectrum efficiency, improve the quality of the service and expand the applications using private land mobile radio... 12.5 kHz channelization offers similar prospects for efficiency as VNB [6.25 kHz] while remaining

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[42] Comments of TIA at 7.

[43] Comments of Ericsson at 6 and 7.

[44] Comments of Motorola at 20.

[45] Comments of Motorola at 22.

[46] Comments of LMCC at 8.

technology-neutral and allowing the development of services and applications that would be precluded under strict VNB channelization."[47] Conversely, several manufacturers and various users support adoption of a narrowband, 6.25 kHz or less, channelization plan immediately.[48] Ericsson states that "... moving directly from 25/30 kHz channels to 6.25 kHz or 6.25 kHz equivalent efficiency channels in all of the bands under consideration would allow spectrum to be used more efficiently."[49] Ericsson also supports, "technical flexibility which allows the PLMR user to determine the particular technology which best suits its needs and which does not discriminate against any type of digital system;" and "a channel allocation plan which ... enable[s] the use of narrowband or wideband channels to accommodate a variety of technologies which will offer the best combination of voice and/or data services as determined by the user."[50] Also in favor of flexibility, Securicor advocates splitting the PLMR spectrum into 2.5 kHz blocks and allowing users to aggregate as many blocks as they need.[51] Securicor states that "[t]his '2.5 kHz or more' band plan would enable a licensee to tailor its bandwidth more precisely to its real needs ..."[52] Cycomm, GEC-Marconi, NTT, PowerSpectrum, SEA, Uniden, and UPS indicate a desire for us to adopt a 5 kHz standard for all bands. In favor of narrowband channels, AT&T states that "... narrowband channels will foster the emergence of new technologies, new service providers using those technologies, and many equipment manufacturers competing to serve this marketplace. That competition will lead to development of more spectrally efficient technologies and lower costs for consumers."[53] NABER presents a somewhat different plan that they called "Bandwidth on Demand," whereby users can combine contiguous 6.25 kHz channels if they can demonstrate that they meet the efficiency standard.[54, 55] AAR presents a

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[47] Reply Comments of Motorola, Inc. at 9-10.

[48] AMRA and ATA/FIT/ITLA/MRFAC supported LMCC's Option B.

[49] Ex parte filing of Ericsson of February 6, 1995.

[50] Comments of Ericsson at 3.

[51] Ex Parte filing of Securicor of April 20, 1995.

[52] Letter from Securicor to William F. Caton, Federal Communications Commission, dated June 7, 1995.

[53] Letter from AT&T to William F. Caton, Federal Communications Commission, dated April 26, 1995.

[54] Comments of NABER at 11.

[55] This plan differs from LMCC's Option A because of the emphasis on using 6.25 kHz channel building blocks to allow licensees with differing needs to justify sufficient bandwidth for their needs.

proposal for the 150-174 MHz band based on 12.5 kHz channel bandwidths spaced every 7.5 kHz apart. Moreover, a "User Coalition Plan" representing approximately 95% of PLMR licensees,[56] was filed on January 13, 1995. The Plan suggests a channel bandwidth of 6.25 kHz in all bands with channel spacings of 7.5 kHz at VHF and 6.25 kHz at UHF provided that an optional step based on 12.5 kHz equipment and a two cycle transition period is allowed.[57] Finally, TIA disagreed with our proposal stipulating different channel bandwidths in each band. They support a common channeling plan for both the VHF and UHF bands and state that, "[d]esigning and producing reliable cost-effective land mobile equipment is a complex task requiring significant investment and time. Employing different bandwidths in the 150 and 450 MHz band would require even more resources."[58]

22. Of particular concern to many parties, especially public safety, is flexibility to implement APCO-25 standard equipment.[59] In its comments, APCO indicates that a 12.5 kHz channelization would allow public safety users to obtain the improvements envisioned by the Project 25 digital standard. Also, allowing use of 12.5 kHz equipment would enhance their ability to interoperate with federal government entities, such as the Federal Bureau of Investigation, the Secret Service, the Department of Defense, and the U.S. Forestry Service.[60] Further, in its comments, APCO states that there is a need for short-term

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[56] See Letter from User Associations to William F. Caton dated January 13, 1995 at 3.

[57] The "User Coalition" plan was submitted by 14 user associations superseding their previously filed objections: American Association of State Highway and Transportation Officials, American Automobile Association, American Petroleum Institute, American Trucking Associations, Inc. Association of American Railroads, Association of Public Safety Communications Officials International, Inc., Forest Industries Telecommunications, Industrial Telecommunications Association, Inc., International Taxicab and Livery Association, Manufacturers Radio Frequency Advisory Committee, Inc., National Association of Business and Educational Radio Inc./Personal Communication Industry Association, Telephone Maintenance Frequency Advisory Committee, UTC - The Telecommunications Association.

[58] Comments of TIA at 16.

[59] The APCO Project 25 standard is a joint federal, state, and local government initiative to develop a suite of technical standards for digital land mobile radio. Phase-one, scheduled to be completed in August 1995, is based on 12.5 kHz frequency division multiple access (FDMA) technology. It is widely supported even outside of the public safety community as a means of providing interoperability between radios built by different manufacturers.

[60] In an effort to improve spectrum efficiency, the National Telecommunications and Information Administration (NTIA) adopted a conversion timetable for federal agencies to migrate to 12.5 kHz equipment in similar VHF and UHF bands by 2005 or 2008. See NTIA

spectrum relief in especially congested areas and supports 12.5 kHz channels for both VHF and UHF frequencies.[61]

23. In its comments, the Academy of Model Aeronautics (Academy) claims, "... that the Commission's proposals for the 72-76 MHz band will have a disastrous effect on an industry with annual sales in excess of $1 billion..."[62] The Academy further states that, "[t]he proposed rules create the possibility that 1-watt land mobile transmitters may be employed in proximity to the R/C modeling activity at random and without warning."[63] The Academy said that because these models, which weigh between 5 and 12 pounds and fly at speeds up to 90 MPH, are frequently flown at events where spectators are present "... it is absolutely critical that the operator of the aircraft be able to control its flight at all times."[64] This view was supported by hundreds of informal letters from individuals, model enthusiasts, and Congressional inquires.

24. Decision. Based on the extensive record on this issue, we have decided to modify our proposed channel spacing plan. We will adopt a channelization plan based on narrowband (NB) channel spacings. Regarding the 72-76 MHz band, we will maintain the existing spacings. Most of the record focuses on making improvements in the four PLMR "main-haul" frequency bands: 150-174, 421-430, 450-470, and 470-512 MHz. We will list channels every 7.5 kHz in the 150-174 MHz VHF band and every 6.25 kHz in the 421-430, 450-470, and 470-512 MHz UHF bands, but allow a flexible approach whereby users can choose equipment which best fits their needs by aggregating up to the equivalent of four narrowband channels.[65] Although channels are listed at narrowband spacings, this approach provides users with the option of utilizing equipment designed to operate with either 5, 6.25, 12.5, or 25 kHz channel bandwidths. Our reasons for reaching these decisions are set forth below.

25. In choosing narrowband as the basis of our channelization plan, we considered

Manual of Regulations and Procedures for Federal Radio Frequency Management at § 4.3.7.

[61] Comments of APCO at 21.

[62] Comments of The Academy of Model Aeronautics at 1.

[63] Comments of The Academy of Model Aeronautics at 11.

[64] Comments of The Academy of Model Aeronautics at 13.

[65] In light of our "on-channel" channelization plan, licensees who desire to aggregate channels for use with 25 kHz equipment would actually need portions of five narrowband channels - the channel corresponding to their center frequency, both first adjacent channels, and one-half of each second adjacent channel. Likewise, 12.5 kHz operation would require the use of portions of three narrowband channels.

the benefits and drawbacks of many different channelization schemes. We find that channelizing at 2.5 kHz would provide the maximum number of channels, but in consideration of current technology and anticipated future trends, we see no substantial benefit to such a channelization scheme. Further, a 2.5 kHz channelization would create a burden on users, all of whom would have to aggregate multiple channels, and unduly complicate the frequency coordination process. Channelizing at 5 kHz would provide a significant increase in the number of available channels and recognize the latest advancements in land mobile technology. However, it would exclude traditional FM technologies and would be substantially narrower than channels employed by most mobile operations.[66] Also, manufacturers of NB equipment acknowledge that it will be about three to five years before NB equipment with a full complement of features can be perfected in the refarming bands and made readily available to users. The channelization plan based on the 5 kHz and 6.25 kHz spacing proposed was supported by only a few commenters, essentially the 5 kHz equipment manufacturers, and was widely opposed by public safety entities, Motorola, TIA, and the majority of existing private radio users. Regarding 12.5 kHz channelization, we find would be more efficient for digital data transmissions, but would not offer significant improvement in spectrum efficiency for voice communications. A 12.5 kHz channelization was supported by the majority of the commenters,[67] but it does not meet the Commission's goals of "substantially" increasing channel capacity.[68] Nor does 12.5 kHz channelization significantly increase the number of available PLMR channels necessary to meet the long range communication needs of this large user community. A 12.5 kHz bandwidth, however, has the following benefits: (1) it provides compatibility with the 12.5 kHz APCO-25 standard equipment being developed by manufacturers in conjunction with the public safety community; (2) it promotes interoperability with 12.5 kHz equipment used by federal government users (such as the Federal Bureau of Investigation, the Department of Defense, and the U.S. Forestry Service); and (3) 12.5 kHz equipment is currently available and can be employed immediately to alleviate severe congestion situations. We also considered a 7.5 and 6.25 kHz "narrowband" channeling plan. This scheme substantially increases the number of available communications channels, while still providing data capabilities adequate for the majority of users. This scheme would also accommodate 5 kHz operations, but would exclude most 12.5 kHz equipment and wideband (25-30 kHz) systems. Finally, we considered leaving PLMR channels at their current

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[66] A 5 kHz channel bandwidth is substantially smaller than the 12.5 or 25 kHz bandwidths currently specified for SMRs, 40 kHz for cellular, 12.5 or 50 kHz for "narrowband" PCS, 25 kHz for maritime mobile, and 25 kHz for aeronautical mobile services.

[67] For example see Comments of NABER at 11, Comments of AAR at 24, or Joint Comments of ITA, Council of Independent Communication Suppliers, and Telephone Maintenance Frequency Advisory Committee at 14.

[68] By "substantially," we refer to our goal of a fourfold increase in the actual number of channels available.

spacing, i.e., generally 15 kHz at VHF and 25 kHz at UHF. This plan would have the advantage of using current equipment, but similar to channelizing on 12.5 kHz, there would be no gain in the number of communication channels available to users. Thus, we find that leaving the existing channel spacings garners few benefits to the user community.

26. Upon consideration of the factors summarized above, we conclude that the best approach is to establish a narrowband channel plan that also allows users the flexibility to aggregate channels to allow them to employ wider band equipment when it best suits their communications requirements. Generally, we will list assignable channels every 7.5 kHz in the VHF band and every 6.25 kHz in the UHF bands based on current channel centers. Channelizing on current channel centers ("on-channel") will allow users to remain on their current licensed frequency throughout a transition to narrowband. Remaining on-channel was seen as critical to existing licensees. As emphasized by existing users, on-channel transition will minimize confusion and provide a simpler migration path. Adopting a 7.5/6.25 kHz narrowband channelization plan rather than the 5/6.25 kHz plan proposed will accommodate, not only 5 kHz, but also 6.25 kHz equipment without any restrictions. Finally, for example, in order to accommodate the wide variety of licensees and their varied uses of PLMR, we will allow the use of wideband equivalent technologies, e.g. TDMA, across an aggregation of narrowband channels.

27. Since we are allowing the use of wideband equipment, we are also taking steps to reduce instances of detrimental adjacent channel interference and generally make a transition to narrowband technology easier on PLMR users. To this end, we will place some restrictions on the maximum bandwidth that can be used on certain channels in the refarming bands. In the 150-174 MHz band, licensees may use equipment designed to operate with a channel bandwidth of 25 kHz or less on any channel available prior to the effective date of the rules adopted in this proceeding. Only equipment designed to operate with a channel bandwidth of 12.5 kHz or less may be used on any of the channels 7.5 kHz removed from any existing channel.[69] In the 421-512 MHz band, licensees may use equipment designed to operate with a channel bandwidth of 25 kHz on channels available prior to the effective date of the rules adopted in this proceeding. Only equipment designed to operate with a channel bandwidth of 12.5 kHz or less may be used on any of the channels 12.5 kHz removed[70] from any existing channel and only equipment designed to operate with a channel bandwidth of 6.25 kHz or less may be used on any of the channels 6.25 kHz removed from any existing channel. Additionally, the particular operating environment of each licensee may dictate that separation requirements be imposed by the frequency coordinators. See infra. para. 76 on

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[69] Existing channel refers to any channel available prior to the effective date of the rules adopted in this proceeding.

[70] Users currently licensed for 25 kHz operation on any of the low power offset channels will continue to be licensed for such operation until they decide to transition to narrowband equipment.

the use of separation requirements for wideband (25 kHz or 12.5 kHz) equipment. Also, the use of wideband equipment will be subject to certain efficiency standards.

28. Finally, regarding 12.5 kHz equipment which does not meet our narrowband efficiency standard, we will allow licensees to use true 12.5 kHz equipment during a transition to narrowband technology.[71] This is supported by a majority of users who want to implement equipment designed to meet the 12.5 kHz APCO-25 technical standards. Therefore existing users, who desire to transition to NB, will have the option of transitioning in one step directly or more conservatively via two steps: first to 12.5 kHz then to NB technology. It also will allow users in extremely congested markets to double their capacity almost immediately by employing readily available 12.5 kHz equipment. This approach provides licensees additional flexibility during the transition to select technology best suited to their needs and minimize the impact to their operations. This is consistent with the majority of the commenters. In particular, public safety argued that permitting an intermediate 12.5 kHz step is essential to providing a smooth migration path for existing operations.

29. In summary, our approach does not favor any particular type of land mobile technology, but adopts rules that permit the use of new spectrum efficient technologies. This provides technical flexibility by removing current barriers to allow entry of new technology into the private land mobile marketplace. It permits the use of narrowband channels for voice communications and slow-speed data transmissions while also allowing users with requirements for wideband technologies, such as high-speed digital and data transmissions, to employ them. This decision recognizes the operational requirements of a large, diverse community of users and provides a plan that enables the PLMR community to substantially increase the spectrum efficiency of these bands. This approach is consistent with the User Coalition Plan and includes the following benefits: better data transfer capabilities and lower equipment costs than our proposed plan, and technical neutrality -- allowing for 5, 6.25, 12.5 or 25 kHz equipment. This channelization plan provides regulatory flexibility to both users and manufacturers. By adopting a NB channelization plan, we set the direction for the industry to meet our long term goal of increasing the efficiency of the PLMR frequency bands. Moreover, this plan is technology neutral -- it allows all manufacturers and modulation techniques to compete in an open marketplace. It satisfies concerns expressed by many parties, particularly the public safety community and users, such as railroads, who provide critical functions, that the plan include options permitting the selection of proven technology, including portable and feature-rich products. Further, these parties argue that reliable radio service must be maintained during the transition to NB. This plan allows users to review all technology options, solicit competitive bids if appropriate, and choose whichever system is best suited to their communications needs. Moreover, it allows market forces to govern technology and equipment selection based on price and actual performance.

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[71] A few channels, designated for use as low power and itinerant stations in the Business Radio Service, will remain 12.5 kHz channels. See paragraph 89.

of the differing technologies.

C. Time Frame For Transition To Narrowband

30. Proposal. An essential element of the channelization plan is the transition period in which it must be implemented. The Refarming Notice proposed that all systems, including rural areas, would have to convert to narrowband technology over a 10-20 year period depending upon market size. Specifically, we proposed that existing systems in the top 15 markets convert to narrowband technologies by 2004 (approximately ten years). We proposed a graduated schedule from 2005 to 2012 for markets 16-100 to convert to narrowband. Markets 101 and above would be required to convert to narrowband technologies by the year 2014.

31. Comments. There are several common themes throughout most of the comments we received on this issue. In general, most commenters emphasize that the transition period should allow for sufficient planning for licensees to amortize existing equipment. Commenters also emphasize the necessity for users to maintain the reliability of their communication systems during any transition period. Finally, as incorporated in the User Coalition plan, others urged that the type acceptance process be used as the catalyst for migration to new, more efficient technologies.

32. TIA and APCO among others argue for planning cycles long enough for full amortization of equipment. TIA asserts that public safety and public service users typically amortize their investments over ten years or more and expect their systems to have a twenty year life cycle.[72] Further, APCO comments that "public safety users ... typically operate on extremely limited budgets and are forced to maximize the useful life of their radio equipment. Premature equipment change-outs would cost state and local governments billions of dollars, the burden of which would rest on taxpayers."[73] Finally, the joint comments of ITA, CICS, and TELFAC, "urge the Commission to adequately provide for the graceful transition and amortization of imbedded systems as well as a sufficient planning cycle to implement new technologies." And, "... given both the size of the investment of radio systems and the vital role which the communications systems serve, it is not feasible for licensees to change-out their entire system at one time."[74] Emphasizing this point, many

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[72] Comments of TIA at 5-6.

[73] Comments of APCO at 12.

[74] Joint Comments of ITA, CICS, and TELFAC at 11.

public safety entities and small businesses[75] note that they operate under unique budgetary constraints which limit them to gradual equipment upgrades, rather than one-time system replacements.[76]

33. Additionally, any interruption to service may have a disastrous effect on safety-related operations. The User Coalition plan asserts that, "... most private land mobile users place an extremely high priority on maintaining communications capability ..."[77] This plan suggests two change-out periods of 10 years each to permit a graceful migration from one technology to another. Further, Motorola points out that for PLMR users the most important aspect of a radio system is that it provide reliable, efficient, timely, and cost-effective communications, and "... [t]herefore, premature system change-outs based solely on regulatory mandates are viewed as a waste of resources."[78] APCO states that our proposal "... must be accomplished in a manner that does not impair the degree or quality of communications ..."[79]

34. Finally, many commenters, including the User Coalition, suggest that the type acceptance process should provide the catalyst for the transition from one technology to another. The User Coalition plan recommends that after January 1, 2011, all newly type-accepted equipment would have to be capable of operating on 6.25 kHz or narrower channels. After January 1, 2021, available equipment would be further limited by banning the sale of equipment not capable of operating on 6.25 kHz or narrower channels. Other dates associated with this plan were crafted with two different user environments in mind: urban and rural. After January 1, 1997, the licensing of both new urban and rural systems would be restricted to operating on channels of 12.5 kHz or less or be relegated to secondary status. Further, all urban systems would have to operate on channels of 12.5 kHz or less after January 1, 2007. After January 1, 2011, new systems, both urban and rural, would only be licensed only if they operated on channels of 6.25 kHz or less. And finally, all systems would have to operate on channels of 6.25 kHz or less after January 1, 2021 to

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[75] According the U.S. Department of Commerce, 70% of all businesses in America are small businesses. According to NABER and Commission data bases, there are 300,000 licensees in the Business Radio Service. Therefore, approximately 210,000 small businesses could be affected by this proceeding.

[76] Comments of APCO at 12 and Comments of NABER at 8.

[77] Letter from User Associations to William F. Caton, Federal Communications Commission, dated January 13, 1995.

[78] Comments of Motorola at 10.

[79] Comments of APCO at 11.

retain primary status.[80] As stated previously, this plan has the support of approximately 95% of the user community. Also in support of using the type acceptance process to stimulate the transition to narrowband technologies, Motorola states that the Commission should, "[r]equire through the type-acceptance process that manufacturers begin populating the market with true 12.5 kHz capable equipment, ensuring a smooth migration for users."[81] To this end, Motorola recommends that after January 1, 1996, the Commission should no longer type accept equipment that cannot be readily converted to 12.5 kHz operation.[82] APCO comments that after two years of the effective date of the Report and Order, equipment should not be manufactured or type accepted unless it meets stated requirements.[83] NABER proposes a two step plan in which Step One involves the discontinuation of type acceptance for new 25 kHz or 30 kHz analog equipment as soon as practical.[84]

35. Decision. Determining an appropriate transition period for rechannelization requires balancing the economic and operational impacts of existing users. Many comments note that the transition from the current 25-30 kHz equipment to narrowband technologies involves a substantial replacement of system infrastructure. Existing licensees emphasize that they have over $25 billion dollars invested in imbedded equipment and much of that equipment is not compatible with narrowband technologies. Although users state that many systems last between 15-20 years, there was general agreement that 10 years (at 10 percent change-out per year) was a reasonable transition cycle. Following this reasoning, the User Coalition Plan, as described above, contemplates two replacement cycles and requests a 26 year transition period.[85]

36. We have decided to manage the transition to more spectrum efficient use of the PLMR frequency bands by the type acceptance process as suggested by the User Coalition Plan, Motorola, and others. We are requiring that future equipment meet increasingly efficient standards over a ten year period. With the introduction of market-based incentives as discussed in the FNPRM, this plan will permit and promote a natural migration to new technologies.

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[80] Letter from User Associations to William F. Caton, Federal Communications Commission, dated January 13, 1995.

[81] Comments of Motorola at v.

[82] Comments of Motorola at 24.

[83] Comments of APCO at 15.

[84] Comments of NABER at 20.

[85] The 26 years provides two cycles as follows: 16 years to convert from 25 kHz analog to 12.5 kHz digital systems (that is, APCO-25 type equipment) plus 10 years to convert from 12.5 to 6.25 kHz digital equipment.

37. The discussion regarding channelization has been dominated by concerns regarding time frames for introducing narrowband technology.[86] The comments generally discuss extended schedules, e.g., 26 years in the User Coalition plan. Most of these time frames conservatively favor full amortization of equipment, and assume unnecessarily long lead times for development and marketing of new narrowband technologies. We have decided to adopt a plan that provides a flexible framework within a much shorter period of time by which market-based incentives can be introduced into these private wireless bands. In contrast to many comments and the User Coalition plan, we have decided not to implement a comprehensive set of dates mandating strict manufacturing and licensing requirements. Rather, we conclude that the best approach is to specify type acceptance dates to guide the transition process. Recognizing that there is over $25 billion in equipment investment in these PLMR bands, we will provide users immediate flexibility in equipment decisions and provide a period for the development of new technologies. This transition plan provides users the option of continuing to use existing equipment, transitioning immediately to more efficient narrowband equipment, or waiting until a full line of affordable narrowband equipment is available and costs become competitive, before changing out their systems. Thus, this plan allows each licensee the freedom to choose equipment and a transition schedule that best fulfills their needs while balancing technical capabilities and financial considerations. Since the rules we are adopting provide a great deal of flexibility to each individual licensee by being permissive rather than restrictive, requiring both rural and urban users to comply with them will not create an unreasonable burden.

38. The transition dates for the type acceptance rules we are adopting are as follows:[87]

August 1, 1996 - New type accepted equipment must be designed to operate on channels of 12.5 kHz or less or on 25 kHz channels if the narrowband efficiency standard is met (multi-mode equipment that operates on 25 kHz channels will be allowed if it is also capable of operating on 12.5 kHz and/or narrower channels).

January 1, 2005 - New type accepted equipment must be designed to operate on channels of 6.25 kHz or less or on channels up to 25 kHz if the narrowband efficiency standard is met (multi-mode equipment that operates on 25 kHz and/or 12.5 kHz channels will be allowed if it is also capable of operating on 6.25 kHz or narrower channels).

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[86] A diagram of migration options that users may employ during the transition period is provided in Appendix A, Figure 6.

[87] Different provisions apply for paging, "color dot," and itinerant channels (see discussion later in document).

39. Our plan requires manufacturers to begin providing narrowband equipment over the next ten years. This ten year transition schedule is supported by the PLMR community.[88] Ten years affords PLMR users and manufacturers sufficient time to develop technical standards for narrowband radios and to design and test such radios. It is essential to allow sufficient time for the establishment of these standards in order to ensure that users will have the option of purchasing interoperable radios from multiple vendors. Further, this time period will provide ample time for different modulation techniques to be studied for compatibility and interference effects. Finally, since 5 kHz systems are currently allowed in the 150-170 MHz band[89] and 5 kHz systems are proliferating in the 220-222 MHz band, we believe that it is reasonable to expect manufacturers to produce 6.25 kHz equipment in the refarming bands within ten years.[90]

40. The Commission's type acceptance rules provide some flexibility by which manufacturers can continue to support their existing equipment through upgrades and modifications. Wideband equipment can continue to be produced, but these radios must include a multi-mode feature.[91] We believe that as systems wear out, and new radios are bought, users, will have a natural inducement, without a Government mandate, to use the narrower bandwidth of the multi-mode radios in order to avoid excessive adjacent channel interference. This will allow a natural transition to more efficient systems as new equipment is bought within each users normal replacement cycle. We also believe that a natural inducement exists for all users, especially those located in congested areas, to migrate to narrowband equipment as it becomes available. The use of narrowband technology will ease congestion because more channels may be used in a common geographic area. Finally, this plan maintains flexibility to introduce additional market-based incentives into these bands. We discuss these incentives to encourage greater spectrum efficiency in more detail in the FNPRM.

41. One additional aspect of our plan concerns licensing on some of the new

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[88] Letter from American Petroleum Institute, Association of American Railroads, Industrial Telecommunications Association, Inc., APCO-International, Inc., Utilities Telecommunications Council, and the International Association of Fire Chiefs, Inc. and International Municipal Signal Association to Chairman Reed E. Hundt, Federal Communications Commission dated June 5, 1995.

[89] 47 C.F.R. § 90.271 allows the use of narrowband operation on frequencies 2.5 kHz or 7.5 kHz removed from regularly assignable frequencies in the 150-170 MHz band.

[90] Letter from Ericsson to William F. Caton, Federal Communications Commission, dated April 27, 1995, and comments of Securicor at 4 and 5.

[91] Equipment that is type accepted prior to each of the transition dates may continue to be manufactured and used indefinitely. For example, a 25 kHz radio that is allowed today can still be manufactured after August 1, 1996.

channels in the 150-174 and 421-512 MHz bands. License applications will not be accepted until one year after the effective date of the rules adopted in this proceeding for channels 7.5 kHz removed from any currently listed channel in the VHF band and for channels 6.25 kHz removed from any existing channel in the UHF bands. This date will permit manufacturers sufficient time to obtain type acceptance for equipment that complies with our new technical requirements which dictate that equipment after this date be capable of operating with 12.5 kHz or less channel bandwidth or with narrowband equivalent efficiencies.[92] The time lapse between adoption of the new rules and licensing on these new frequencies will also permit frequency coordinators time to establish proper coordination procedures for these frequencies.

D. Consolidation of Radio Services

42. Proposal. The Refarming Notice proposed consolidating the radio services in the PLMR bands below 800 MHz.[93] Specifically, we proposed to either consolidate the current radio services into three broad categories: a Public Safety radio service, a Non-Commercial radio service, and a General Category radio service[94] or to retain the current services with their existing channel assignments, but assign all new frequencies to the new broad categories.[95] In the Refarming Notice, we also proposed that there would be multiple coordinators for the consolidated radio services. Applicants could go to any recognized coordinator for the appropriate radio service.

43. A system of narrowly defined radio services has been in place for decades. The

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[92] This action is comparable to our decision to not issue licenses in the 220-222 MHz band until type accepted equipment became available. See Report and Order, PR Docket No. 89-552, 6 FCC Rcd 2356, 2365 para. 69 (1991).

[93] The twenty (20) PLMR services which are the focus of this proceeding are the Public Safety Radio Services (Local Government, Police, Fire, Highway Maintenance, Forestry-Conservation, and Emergency Medical), the Special Emergency Radio Service, the Industrial Radio Services (Power, Petroleum, Forest Products, Video Production, Relay Press, Special Industrial, Business, Manufacturers, and Telephone Maintenance), and Land Transportation Radio Services (Motor Carrier, Railroad, Taxicab, and Automobile Emergency).

[94] Under the Refarming Notice, the Public Safety Radio Service would combine the current public safety services into a radio service similar to the current Local Government Radio Service. The Non-Commercial Radio Service would be defined, as in the 220 MHz band, for internal use by an entity. The General Pool would essentially be the current Business Radio Service, which includes commercial entities.

[95] Refarming Notice at paras. 17-19.

separate radio services were designed to aid in the ease of operation in the assignment of frequencies and to respond to the varied needs of the user community. However, a disadvantage of the system became evident as channel utilization became uneven across the PLMR services.[96] Recognizing the disparities in channel usage among the PLMR services, in 1981 the Commission instituted rules to facilitate sharing among various radio service categories below 470 MHz.[97] The rules provided that in the 150-174 MHz and 450-470 MHz bands, where no satisfactory frequencies are available within an applicant's own radio service in the desired area of operation, an applicant may be assigned channel(s) available in a different radio service.[98] In instituting these rules, within a category of users, frequencies allocated to one radio service may be used in another radio service in the same category.[99] The advance of interservice sharing demonstrated the benefits of users reaching beyond their narrowly defined category of services to satisfy their frequency needs.

44. The Refarming Notice recognized that as the need for spectrum has increased, the practice of interservice sharing has become more common in the PLMR environment. However, because of the multiplicity of radio services, the practice of interservice sharing has become more difficult to implement because it is time consuming, expensive, and burdensome.[100] In terms of usage patterns, the current allocation system for the radio services inhibits spectrum efficiency by making certain spectrum efficient technologies more difficult to implement. Some digital multiple access techniques, including time division multiple access (TDMA), require several adjacent channels to operate efficiently. Because specific channel allocations for each of the radio services are generally scattered within the PLMR bands, rather than in contiguous blocks, spectrum necessary to implement such techniques is difficult to amass.[101] The Refarming Notice, cited the Joint Commenters who note that "[w]ithout consolidation, the industry may find it cumbersome to implement

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[96] In the Refarming Notice, we noted that a study of our licensing database in April, 1992, showed very wide variations in usage, often exceeding factors of ten for channels in the same frequency band designated for different radio services. Refarming Notice at para. 14.

[97] Report and Order, PR Docket No. 81-110, 46 Fed. Reg. 55701 (1981).

[98] 47 C.F.R. § 90.176.

[99] The Commission established separate categories of users for the purposes of interservice sharing including Public Safety Radio Services, the Special Emergency Radio Service, Industrial Radio Services, and Land Transportation Radio Services.

[100] Refarming Notice at para. 16.

[101] Inquiry at para. 85.

spectrum efficient technologies... in the bands below 470 MHz."[102]

45. In the Inquiry, we noted that certain radio services share many of their channels and could be consolidated without significant impact on the groups eligible for those channels.[103] Thus, for the reasons set forth above, the Refarming Notice proposed establishing a system of consolidation to introduce a greater degree of flexibility in the assignment of frequencies and maximize the benefits of the PLMR spectrum.

46. Comments. There is no industry consensus on the subject of consolidation of PLMR radio services. The comments filed are evenly divided on whether to consolidate the radio services. However, all oppose the Refarming Notice's proposal to consolidate into 3 generalized pools: public safety, non-commercial, and general. Several commenters provide alternative plans suggesting 4-6 radio service pools. For example, ITA, NABER and the Joint Commenters (ITA, CICS, and TELFAC) support a reduction in the number of service pools, but suggest that there should be four or five service pools rather than the proposed three.[104] Those who support consolidation state that the radio services have evolved considerably over the past 30-60 years and that significant changes are necessary. Many note that maintaining 20 services is burdensome and results in inefficient, time consuming assignments of licenses to users.[105]

47. The interservice coordination and sharing may also be improved with consolidation.[106] For example, reducing the number of services could improve spectrum efficiency in that users such as police and fire eligibles in the Public Safety pool, could be allocated channels from the same pool of frequencies and can therefore, utilize shared systems. Ericsson and SEA note that consolidation should make it easier to develop contiguous blocks of spectrum. In addition, a pool arrangement could eliminate the duplicative coordination fees that are often imposed on an applicant when he/she is forced to access channels in a radio service other than his/her own.

48. In contrast, public safety, land transportation, and industrial communities

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[102] Refarming Notice at para. 16.

[103] For example, the Interurban Passenger, Interurban Property, Urban Passenger, and Urban Property Radio Services are already treated in our rules as a combined Motor Carrier Radio Service. See 47 C.F.R. §§ 90.89 and 90.555. The Motion Picture Radio Service shares each of its channels with either the Special Industrial or Relay Press Radio Services. See 47 C.F.R. §§90.69 and 90.555.

[104] Joint Comments of ITA, CICS, and TELFAC at 22 and NABER at 22-26.

[105] Joint Comments of ITA, CICS, and TELFAC at 22.

[106] Comments of Ericsson GE Mobile at 22-23; Comments of PowerSpectrum, Inc. at 8.

generally oppose the consolidation proposal. AAR strongly opposes any change of the PLMR service categories. They argue that any change in the PLMR service pools would negatively effect the frequency coordinator function. "[A]ny change of the PLMR service categories and frequency coordinator functions ... would deprive the railroads of exclusive use and control of the frequencies that are allotted to them. The national and international scope of the railroad industry and the critical safety aspects of its mobile radio applications are unique among PLMR users and require a separate service category..."[107] Further, while NABER favors consolidation of the service pools, it notes that creating multiple coordinators in the various pools may result in a deterioration in the quality of frequency recommendations.[108] Those who oppose consolidation do so in part based upon concern over the Commission's proposal to have multiple coordinators for the consolidated services.[109] In addition, many note the lack of a common database as a factor preventing consolidation. Some argue that consolidation will unnecessarily complicate and reduce the effectiveness of the frequency coordination process. Some parties state that safety may be compromised if the services are consolidated. APCO indicates that the current service blocks have served public safety well, and should not be eliminated.[110] Likewise, IMSA, IAFC, and the National Association of State Emergency Medical Service Directors oppose the consolidation proposal and state that the Commission should maintain discrete public safety services.[111] Thus, all public safety entities claim they cannot effectively share with other public safety entities and urge retention of the current system.

49. The Industrial and Land Transportation entities also oppose consolidation. AMRA states that "[t]he Commission has not explained adequately why it wishes to abolish a spectrum management program that has served the interest of land mobile users so well over half a century." They argue, "the proposal to group all land mobile licensees into 3 arbitrary

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[107] Comments of AAR at 6-7.

[108] Comments of NABER at 30.

[109] Comments of Celpage at 15; Comments of the Coalition of Industrial and Land Transportation Land Mobile Radio Users at 12-13.(Coalition includes Manufacturers Radio Frequency Advisory Committee, Inc., American Trucking Associates, Inc., Forest Industries Telecommunications, and International Taxicab and Livery Association.

[110] APCO further argued that, if the Commission consolidates Public Safety radio frequencies into a single radio service, it must designate a single public safety coordinator for all those channels.

[111] The public safety community is one of the most important users of the radio spectrum. Sufficient mobile communication capacity for agencies charged with protecting the public welfare is of critical importance to the overall well being of this nation. Some of the public safety services include, Police, Fire, Highway Maintenance, Emergency Medical and Special Emergency Radio Services.

groups ignores the specialized requirements of land mobile communications of many user groups, the inherent different priorities in the use of radio, and the successful experience with the current spectrum allocation and management program."[112] Further, AMRA asserts that neither the required common database, nor the means for creating and updating such a database in real time are available. ATA states that no problem exists in the radio services.[113] The Coalition of Industrial Land Transportation Land Mobile Radio Users states: "clearly the public interest and Congressional objectives would not be served by the adoption of policies which cast aside the expertise of the well-established and well-functioning coordinator system - expertise which will be especially valuable in facilitating the introduction of new technologies in the private land mobile bands."[114]

50. Decision. While varying views were expressed in the comments regarding our proposal for consolidation, we continue to believe that consolidation of the PLMR radio services into 2-4 radio services is essential to our goal of increasing efficiency and providing for more flexible spectrum use. Consolidation is desirable to ensure more efficient distribution of the additional channels created as a result of the transition to narrowband technology. Our goal is to generally equalize the opportunity cost of spectrum usage across the PLMR environment. In addition, consolidation will permit licensees to utilize technologically innovative and efficient equipment. Further, maintaining the 20 radio services is administratively burdensome; consolidation will lead to greater operational efficiency for users and promote more flexible use of the spectrum. We note however, that we are departing from the proposal in the Refarming Notice. The plan for consolidation presented in the Refarming Notice provides an initial guideline for consolidation. We are not implementing that plan at this time. Instead, we will give the users in the PLMR community a further opportunity to submit a proposal that reflects the interests and the needs of the PLMR community. PLMR users can best assess their needs and submit a proposal that is representative of the PLMR community and that is mutually agreeable, reasonable, and workable. In addition, we encourage each frequency coordinator to participate, together with the PLMR community, so that they may assess the needs of the user groups. In this regard, it is our intention to create competition in the frequency coordination function by allowing users in the newly created service groups to use the services of any recognized frequency coordinator. We ask the users and frequency coordinators to provide guidance in their consolidation proposal on how this can best be accomplished and on how the existing databases can be shared to ensure fair competition among all of the frequency coordinators. Further, the consolidation proposal should explore creating and implementing a national real

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[112] Comments of AMRA at 6.

[113] Comments of ATA at 9.

[114] Comments of the Coalition of Industrial Land Transportation Land Mobile Radio Users at 13.

time database to reflect frequency assignments, as expeditiously as possible.[115] Also, coordination fees should be discussed in the consolidation proposal filed with the Commission.

51. Most of the objections to consolidation addressed processing difficulties. Others objected to the Refarming Notice's proposal to consolidate services into three categories, and several suggested alternative plans. Our approach gives PLMR users latitude in developing a consolidation proposal which has broader support from the user community. We emphasize, however, that in developing a consolidation proposal, the users should consider that the intended purpose of consolidating radio services is to distribute assignments between low-use and high-use groups more evenly, to simplify interservice sharing procedures, to organize channel allocations that will enable licensees to more easily utilize advanced technologies, and to organize the services in such manner to achieve more efficient and flexible spectrum use. Achieving a consensus on a consolidation plan is the ultimate objective. Although a consensus proposal would be ideal, we are not at this time establishing an advisory committee under the Federal Advisory Committee Act, 5 U.S.C. App. 2, or a negotiated rule making committee, P.L. No. 101-648, 105 Stat. 4969 (1990), 5 U.S.C. §§ 581-590; rather, we are merely encouraging the PLMR community, together with the frequency coordinators, to submit their further views.

52. Since we are further soliciting the views of PLMR users regarding a consolidation proposal representative of the interests and needs of the PLMR community and frequency coordinators, we postpone issuance of a plan in this document. We will give the PLMR community the opportunity to negotiate and submit a comprehensive consensus plan for consolidation to the Commission within 3 months of the effective date of this Report and Order. While not advocating a specific plan for consolidation, nor expressing a preference for the specific designation of the new broad categories, we conclude that reducing the radio services to between 2 (public safety and all other users) -4 user groups is reasonable.

53. We acknowledge that not all users in the PLMR community support the move toward consolidation. We take this approach however, because we believe that maintaining the existing number of services is outmoded and no longer works as efficiently as when the discrete services were first developed and the spectrum was less heavily utilized. We hope that by encouraging PLMR user input, the concerns of all commenters will be considered. Some of the most vocal advocates for maintaining discrete services are Public Safety users, who state that Public Safety is a unique radio service and should remain unchanged to protect the integrity and operation of the service. As we have described, we recognize the importance of the different services, particularly Public Safety, and encourage users to develop a proposal which includes a Public Safety pool. Further, we recommend that users provide clear guidelines as to the requirements for inclusion in the Public Safety pool to

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[115] A "real time database" is a database in which each coordinator would immediately update upon recommendation of a specific frequency,

prevent overcrowding and to maintain the critical functions of the users included within this pool. Additionally, we recommend that users consider whether a single coordinator or multiple coordinators should be used for public safety users. Further, while some commenters argue that the existing system of radio services have served the PLMR community well over the last three decades, spectrum use can be more evenly distributed under a system of consolidation. This change in the system can work to improve the efficiency of the spectrum environment.

54. We disagree with those commenters who contend that the coordination process would be negatively affected if the radio services are consolidated. In the Refarming Notice, we proposed that coordinators continue to perform their current role in the PLMR spectrum and we specifically proposed that licensees be permitted to use any frequency coordinator desired. We did not propose to alter the entire coordination system. Rather, we proposed that users be given latitude to seek the management and assistance of any frequency coordinators desired. These coordinators are familiar with the process, the users, and the regulated spectrum. Finally, while not advocating the adoption of the multiple coordinator design discussed in the Refarming Notice, we believe that this approach would be consistent with our commitment to encourage more flexibility in the PLMR spectrum. Further, such a system, we believe, will promote competition and benefit PLMR users.

55. Therefore, based upon the discussion above, we have decided to consolidate the PLMR services below 800 MHz. We believe that consolidation permits the introduction of marketplace forces and competition into this system. We will issue final rule amendments on this subject approximately 6 months after the effective date of this order without further notice. These rule amendments will incorporate the PLMR community's consensus plan, if consensus is achieved within the rubric of this Report and Order.

E. Technical Parameters.

56. Section B of this Report and Order discusses our proposed channelization plan, comments on that plan, and a discussion of our decision to establish 7.5 kHz channel spacing in the 150-174 MHz VHF frequency band and 6.25 kHz channel spacing in the 421-512 MHz UHF frequency band. In this section, we discuss, in further detail, the channelization plans and related technical parameters that we are adopting.

(1) Band Channelization Plans

57. 150-174 MHz VHF: For frequencies (channels) authorized in the 150-174 MHz band, we generally adopt 6.25 kHz wide channels that are spaced every 7.5 kHz while

maintaining all current frequency designations.[116] Within each individual radio service allocation, interleaved channels are created by assigning channels every 7.5 kHz higher in frequency than each existing channel.[117] In instances where a lower frequency adjacent channel is not allocated to the private land mobile radio services, we are creating an interleaved channel 7.5 kHz lower in frequency than the existing PLMR channel. This interleaved channel will be designated for 6.25 kHz bandwidth operation only in order to minimize the potential of interference to these other services. Each interleaved channel will have the same limitation restrictions, except in certain cases for authorized bandwidth, as the channel which is 7.5 kHz below it.[118] In cases where an existing channel is shared by two or more radio services, the interleaved channel will also be shared among those same services. Where an existing channel is assigned to a single radio service, the interleaved channel will be allocated to only that radio service. Accordingly, the Table of Frequencies listed in the rule section applicable to each radio service, except for the Radiolocation Service, is amended to include the newly created channels. Transition to narrowband channels in the VHF band is shown in Appendix A, Figure 3.

58. The 161.610-174 MHz band is dominated by users other than Part 90 private land mobile licensees.[119] In most cases, the channels for Part 90 use in this band are either not contiguous or their permissible use is limited.[120] The Private Land Mobile Service has a narrow frequency allocation between 173.2 MHz and 173.4 MHz which is not shared with other services. Most frequencies in this band are designated for radio control or telemetry use, and except for frequencies near the band edges, frequencies are spaced 12.5 kHz apart. Frequencies in this band are heavily used in 11 of the Part 90 radio services. Considering their specialized use by a number of different radio services, and their unique channel spacing arrangement, we conclude that it would not be justifiable to rechannelize this small band in order to obtain a few additional frequencies. Therefore, these frequencies will not

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[116] Channels designated for paging-only are not being narrowbanded and will remain wideband. Also, certain current low power (color dot) and itinerant channels will not be narrowbanded beyond 12.5 kHz. See paragraph 101.

[117] Existing channels are those channels available for licensing prior to the effective date of the rules adopted in this proceeding.

[118] In instances where an interleaved channel is created 7.5 kHz lower in frequency than a existing channel, it will have the same limitation restrictions, except in certain cases for authorized bandwidth, as the channel which is 7.5 kHz above it.

[119] Most frequency allocations in this band are for Government/Non-Government shared use in the Maritime Mobile Service and for Government fixed and mobile use.

[120] As an example, eight frequencies in the 169-171 MHz band are designated for low-power wireless microphone operation, and twenty others for use in hydrological or meteorological operations.

be subject to the decisions in this proceeding and will retain their current spacings and authorized channel bandwidths.

59. The Refarming Notice proposed to eliminate 47 C.F.R. § 90.271. This section provides for narrowband (5 kHz) channels that are offset by 2.5 or 7.5 kHz from current channel centers in the 150-170 MHz range. These channels are now inconsistent with the new VHF channelization plan. Therefore, we are adopting our proposal to eliminate 47 C.F.R. § 90.271. Existing licensees on these frequencies may be subject to interference as new frequencies are authorized. However, if interference is not experienced, they will be permitted to remain on their currently authorized frequencies until August 1, 2001, after which they will be required to move to one of the new VHF channels.

60. 421-512 MHz UHF. Except as otherwise noted, for frequencies (channels) authorized in the 421-512 MHz band, we are establishing 6.25 kHz wide channels while maintaining all current frequency designations.[121] Within each individual radio service allocation, interleaved channels are created by assigning channels every 6.25 kHz higher in frequency than each existing channel. In instances where a lower frequency adjacent channel is not allocated to the private land mobile radio services, we are creating an interleaved channel 6.25 kHz lower in frequency than the existing PLMR channel. In order to minimize the potential of interference to these other services, this interleaved channel will be designated for 6.25 kHz bandwidth operation only.[122] Each interleaved channel will have the same limitation restrictions, except in certain cases for authorized bandwidth, as the channel which is 6.25 kHz below it. In cases where an existing channel is shared by two or more radio services, the interleaved channels will be shared among those same services. Where an existing channel is assigned to a single radio service, the interleaved channels will be allocated to only that radio service. Accordingly, the Table of Frequencies listed in the rule section applicable to each radio service, except for the Radiolocation Service, is amended to include the newly created channels.

61. Frequencies in the 421-430 MHz band are available only in Buffalo, Detroit, and Cleveland.[123] Frequencies in the 470-512 MHz band are shared with UHF-TV channels

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[121] Channels designated for paging-only are not being narrowbanded and will remain wideband. Also, certain current low-power (color dot) and itinerant channels will not be narrowbanded beyond 12.5 kHz. See paragraph 101.

[122] In instances where an interleaved channel is created 6.25 kHz lower in frequency than a existing channel, it will have the same limitation restrictions, except in certain cases for authorized bandwidth, as the channel which is 6.25 kHz above it.

[123] See 47 C.F.R. §90.273.

14-20 in eleven cities[124] and the Gulf of Mexico region.[125] Only specific frequencies are available in each city for use by Part 90 licensees.[126] Transition from the current channelization to the adopted narrowband channelization plan in these two UHF band is shown in Appendix A, Figure 5.

62. Frequencies in the 450-470 MHz band are currently spaced 25 kHz apart with secondary, low-power operations permitted on frequencies offset 12.5 kHz from assigned channels.[127] These low-power offset channels are very heavily utilized with the majority being licensed in the Business Radio Service. As discussed in the following paragraphs, the existence of offset low-power channels in this band requires that we adopt a somewhat different approach to new channel usage in this band. Transition from the current channelization to the adopted narrowband channelization plan in the 450-470 MHz UHF band is shown in Appendix A, Figure 4.

63. Section 90.267 of the Rules currently provides for low-power (2-watt) use of the 12.5 kHz offset channels in this band. Under our new channelization plan, these channels will no longer be offsets, but will be regularly assignable channels available in the various radio services as determined by the procedure outlined supra at paragraph 60. This will create instances where a channel that is currently available as an offset in more than one radio service will now be assignable in only one radio service. Therefore, licensees whose frequencies are no longer available in the radio service in which they are licensed will be grandfathered on their current frequency and we will permit these systems to be modified, expanded, and renewed.

64. Since the low-power offset channels will no longer exist as offsets and it is apparent that there is a continuing need for licensees to use low-power operations, we will permit the frequency coordinator for each radio service, as part of the coordination transition plan, to designate channels for low-power use. In order to promote flexibility for regions with differing communications requirements, we will permit coordinators to vary these designations by specific geographic region. Each coordinating entity will be required to maintain and supply to the public upon request, information on frequencies it designates for low-power use and the areas in which these frequencies are designated for such use.

65. Current licensees of 12.5 kHz offset frequencies, in addition to being subject to

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[124] The rules specify use of this spectrum for thirteen cities, but TV Channels 14 and 15 in Cleveland, Ohio and 15 and 16 in Detroit, Michigan are not available for land mobile use due to concerns raised by Canada. See 47 C.F.R § 90.303.

[125] See 47 C.F.R. § 90.315

[126] See 47 C.F.R. § 90.303

[127] See 47 C.F.R. § 90.267

the same transition schedule as high-power users, will have several options: 1) they may remain on the frequencies for which they are licensed; or, 2) move to frequencies designated specifically for low-power use. Users who choose to remain on their current frequency may achieve primary status by raising their output power, and by supplying their station coordinates (latitude and longitude) to the Commission through the appropriate frequency coordinator.[128] Users who wish to invoke this option must provide justification for raising their output power. Licensees on the offset frequencies who wish to remain at low-power on their current frequency will be secondary to new high-power operations on these frequencies. Users who choose to move to designated low-power frequencies will be given primary status on those frequencies after submitting their station coordinates to the Commission through the appropriate frequency coordinator.

66. Low-power operations that were permitted on offset frequencies under 47 C.F.R. § 90.267 have been beneficial to private land mobile operations. This rule provided licensees not requiring high-power radio systems access to many frequencies reserved for low-power operation, albeit on a secondary, non-interference basis. We conclude that similar rules, consistent with our new channelization plan, should be adopted. We, therefore, will make narrowband low-power offset channels available that are 3.125 kHz removed from any regularly assignable frequency in this band, unless otherwise noted.[129] These frequencies will be authorized on a secondary basis and will be subject to all frequency coordination requirements.

(2) Power/Antenna Height Limits

67. Proposal. Another important major technical issue that significantly affects spectrum efficiency is transmitter power and antenna height limits. It should be noted that limiting these parameters directly influences channel reuse which, in turn, ensures access to these bands. Currently, the maximum permitted output power level in the 150-174 and 450-470 MHz bands is 350 watts, with no reference to antenna height or effective radiated power (ERP). The Refarming Notice proposed limits for the 150-174 and 450-470 MHz bands of 300 watts ERP at 60 m (200 ft) height above average terrain (HAAT), with lesser power at greater antenna heights. These limits were chosen to permit general station spacings of about 80 km (50 mi) using a 10 dB desired-to-undesired signal strength

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[128] Low-power offset users, being licensed as mobile units, now are generally authorized an area of operation such as a radius around a descriptive point, within a county or a city, etc., but not around a specific set of coordinates.

[129] Offset frequencies will not be authorized between the frequencies designated for paging-only in the Business Radio Service.

protection criteria.[130]

68. Comments. Many commenters express concern that our transmitter power/antenna height proposal would be very costly to implement because they would force users to add additional stations to cover their existing service area.[131] Commenters also point out the need for extensive rural coverage as well as coverage for specific geopolitical territories.[132] Many commenters note the delicate balance between some entities serving small areas, others needing large service areas, and those operating "ribbon" systems.[133] LMCC submitted an alternative plan proposing to protect variable-sized service areas.[134] LMCC suggests incorporating tables, known as "Safe Harbor" tables, of power and antenna height limits based on service area radius. The Safe Harbor concept and tables proposed by LMCC was widely supported.[135]

69. Decision. Upon review of the concerns expressed in the comments on our proposed power/antenna height limits, we remain convinced that steps must be taken that will permit increased channel reuse. The existence of high power systems can limit the choices available to other current and future co-channel users. In addition, the use of more transmitter power than necessary is contrary to the Commission's rules and reduces the amount of spectrum available for other users.[136] Based on the information before us, we will adopt a modified version of the Safe Harbor tables recommended by LMCC for the 150-174 MHz and 450-470 MHz bands. Further, to minimize the impact on existing

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[130] The Refarming Notice proposed to retain the current power limitations for the 421-430 MHz band as specified in 47 C.F.R. § 90.279, and for the 470-512 MHz band as specified in 47 C.F.R. § 90.309.

[131] Among others, see Comments of Florida Division of Communications, State of Illinois, and Orange County, California.

[132] Comments of APCO at 30.

[133] Entities, such as railroads and petroleum pipelines, need to serve narrow geographic areas for relatively long distances. These types of operations are referred to as "ribbon" systems.

[134] Comments of LMCC at 17.

[135] Comments of UTC at 44; Joint Comments of ITA, the Council of Independent Communication Suppliers, the Telephone Maintenance Frequency Advisory Committee at 15.

[136] 47 C.F.R. § 90.205(a) states that applications for authorizations must specify no more power than the actual power necessary for satisfactory operation.

stations, these new rules will apply only to new stations.[137] Our purpose is to increase channel reuse while allowing PLMR licensees the flexibility they need to design individual systems. We believe that the Safe Harbor approach will provide this flexibility. These new power and antenna height limits are well suited for the diversity of service areas and operating requirements of licensees in the PLMR services.

70. The new rules contain tables for determining a station's allowable ERP which is dependent upon a justified service area radius and actual station antenna height.[138] The maximum service area radius permitted for all systems will generally be 40 km (25 mi) for the 150-174 MHz band and 32 km (20 mi) for the 450-470 MHz band. In all cases, the maximum allowable ERP is 500 watts, which is generally consistent with the vast majority of existing systems.[139] Because applications for frequencies in the 150-174 MHz and 450-470 MHz bands will now be required to include service area radius, ERP, and HAAT data, applicants will be required to provide this information.

71. The rules we are adopting do not provide for as close a co-channel frequency reuse distance as the rules proposed in the Refarming Notice. Therefore, to minimize the potential for co-channel interference, we will require applicants to justify requests for service area radii of greater than 40 km (25 mi) in the 150-174 MHz band and 32 km (20 mi) in the 450-470 MHz band.[140] Further, we will rely on the frequency coordinators to review applicant requests for power, antenna height, and service area. Frequency coordinators may request additional information from the applicant when needed to permit the coordinator to make a proper frequency recommendation. If the applicant disagrees with the coordinator's recommendation, the Commission will resolve the dispute on a case-by-case basis.[141]

72. We agree with LMCC that there should be flexibility in the rules to permit

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[137] A *new station* is defined as one which is not functionally integrated with an earlier-installed system.

[138] The ERP/antenna height table for the 150-174 MHz band is based on providing a 37 dBu signal at the service area contour using R-6602, Figure 19. For the 450-470 MHz band, 39 dBu and R-6602, Figure 29 was used. See FCC Report No. R-6602, Development of UHF and VHF Propagation Curves, September 7, 1966.

[139] It is also consistent with our limits for the 220-222 MHz band.

[140] In general, we believe that individual PLMR base stations operating in an urban environment and using frequencies in the 150-174 MHz or 420-512 MHz bands should be designed to provide local operation.

[141] In the event of a dispute, both parties will be required to justify their positions with technical data, but the applicant will be responsible for proof and persuasion in overturning the coordinator's recommendation.

applicants to propose use of higher transmitter powers when required, and thus we are also adopting rules that permit an applicant to request power/antenna heights in excess of those in the tables. Such requests must be accompanied by an engineering analysis demonstrating that the requested station parameters will not produce a signal strength in excess of 37 dBu for the 150-174 MHz band and 39 dBu for the 450-470 MHz band at any point along the edge of the service area that the applicant requests. The technical submission will be based on generally accepted good engineering practices and standards. This showing must be submitted to the appropriate frequency coordinator who may then recommend an ERP/HAAT appropriate to the applicant's service area. The coordinator will specify for each base station one of the service area radii designated in the appropriate table in § 90.205.

73. In sum, we believe that this action will reduce the incidence of over-powered systems, reduce background noise, and provide technical flexibility for PLMR licensees. These new standards should increase channel re-use and, thereby, improve spectrum efficiency. From the record, it appears that many existing licensees already comply with these limits. These new rules are also consistent with rules for 220-222 MHz and above 800 MHz and, thus, further our goal of developing and implementing consistent policies, where possible, across all frequency bands. Finally, the transmitter power/antenna height limits that we are adopting are sufficiently well defined to avoid placing a significant administrative burden on applicants, licensees, frequency coordinators, and the Commission.

(3) **Adjacent Channel Separations.**

74. Proposal. The amount of adjacent channel interference protection realized between radio systems is generally directly related to the frequency separation between them.[142] The Refarming Notice, however, did not propose specific adjacent channel separation requirements.

75. Comments. Not having proposed or requested comments on this issue, when adjacent channel separation for interference protection was mentioned in the comments, it was in a very general manner without specific recommendations being made. Also, since we are adopting channelization plans different from our proposal, comments received on this issue are generally no longer accurate.

76. Decision. The level of interference protection provided by the frequency

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[142] The first adjacent channels are defined as the channels immediately above and immediately below a selected channel. The second adjacent channels are those channels, one channel removed from a selected channel. The third adjacent channels are three removed and so on. Since, not all PLMR users will transition to narrowband technologies at the same time, it may be necessary when determining adjacent channel interference protection requirements, to consider not only the first adjacent channel, but also the second and even the third adjacent channel.

separation between current assignments and new assignments using frequencies resulting from channel splitting may not be sufficient to permit same-area high-power operation.[143] Thus, in order to not degrade communications quality below that presently afforded land mobile licensees in these bands, in some situations it may be necessary to place certain restrictions on the operation of new adjacent channel assignments, such as requiring a geographic separation or operation at substantially reduced power. Specific restrictions will depend on a number of system parameters such as transmitter power, antenna height, and distance between stations, all of which may vary considerably between systems. We believe that there is not a sufficient record in the comments on which to base specific adjacent channel station separation requirements with respect to the new channelization plan. We also believe that the frequency coordinators, with their knowledge of user requirements and local conditions, are in a better position than the Commission to determine separation distances needed in each case. Accordingly, we are not adopting any specific mileage separation requirements at this time. The current separation requirements in 47 C.F.R. § 90.173 will remain in effect until June 1, 1996. After this date we will require the appropriate frequency coordinators to review applications for adjacent channel usage and determine appropriate separation distances based upon the technical characteristics of proposed and existing station(s). We will revisit this issue if the land mobile community believes specific adjacent channel station distance separations are needed .

(4) Authorized Channel Bandwidth.

77. **Proposal.** The Refarming Notice proposed channel spacings of 5 kHz for the 150-174 MHz (VHF) band and 6.25 kHz for the 420-512 MHz (UHF) band with authorized bandwidths of 4 kHz and 5 kHz respectively (80% of the channel spacings).

78. **Comments.** The comments contained extensive discussions on channel spacing. Except for commenters supporting 5 kHz channels in both the VHF and UHF bands,[144] most commenters did not specifically address the 4 kHz authorized bandwidth proposed for the VHF band. Stone comments that techniques are available that would permit authorization of full channel bandwidth rather than the 80% authorized bandwidths as proposed in the Refarming Notice. However, Stone also asserts that the proposed bandwidths are probably sufficient for those systems whose operational characteristics do not require the use of the full channel width.[145] The Telecommunications Industry Association (TIA) and Motorola recommend that the authorized bandwidth for the UHF band be increased from 5 kHz to

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[143] About 70 dB adjacent channel protection, determined from transmitter and receiver design parameters, is generally needed for same area operation.

[144] Comments of Securicor at 7, SEA at 8 and 14, and AMI at 5.

[145] Comments of Stone at 7.

6 kHz.[146] E.F. Johnson states that the use of 5 kHz or 6.25 kHz channelization should be revisited in another rule making proceeding, and therefore, the Commission should indicate that any occupied (authorized) bandwidth rules are transitional.[147] GEC-Marconi indicates that the proposed 5 kHz UHF authorized bandwidth will require very high modulation level schemes resulting in increased equipment complexity.[148] UPS, while not specifically discussing the actual authorized bandwidth of a narrowband channel, states that success has been achieved in providing high-capacity narrowband channels at 220 MHz (where the authorized bandwidth is 4 kHz) and, that the transition to channels spaced as narrow as 5 kHz is both feasible and generally desirable for the frequency bands below 512 MHz.[149]

79. Decision. As previously discussed, we are adopting a channel plan in which frequencies are assigned every 7.5 kHz in the 150-174 MHz VHF band and every 6.25 kHz in the 421-512 MHz UHF band. In the transition to narrowband operation, we will authorize licensees to operate in the 150-174 MHz and 421-512 MHz bands with either a 12.5 kHz or 6.25 kHz channel bandwidth. Considering our channeling plan, and after analysis of the comments concerning authorized bandwidths, we are adopting maximum single channel authorized bandwidths that we consider appropriate for both voice and non-voice applications. We agree with TIA and Motorola that for 6.25 kHz channels, our proposed 5 kHz authorized bandwidth should be increased to 6 kHz to accommodate a 9600 bits per second CQPSK signal.[150] We concur with the comments and conclude that these bandwidths will accommodate both reduced deviation analog systems and digital systems utilizing advanced modulation techniques.

80. Accordingly, applicants for new stations in the 150-174 MHz and 421-512 MHz bands requesting authorization to operate on frequencies with a 12.5 kHz channel bandwidth will be authorized a maximum bandwidth of 11.25 kHz.[151] Applicants requesting to operate on frequencies in the 150-174 MHz and 421-512 MHz bands with a 6.25 kHz channel bandwidth will be authorized a maximum bandwidth of 6 kHz. Bandwidths for wideband systems will be authorized on a case-by-case basis.

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[146] Comments of TIA at B3, and Motorola at C2.

[147] Comments of E.F. Johnson at 13.

[148] Comments of GEC-Marconi at 4.

[149] Reply comments of UPS at 5.

[150] See Comments of Motorola at C2 and TIA at B3.

[151] See infra para 87.

(5) Emission Masks.

81. We consider the emission mask to be one of the most significant factors in the technical standards we are adopting in this proceeding. To maximize spectrum efficiency, the limited bandwidth in a narrowband channel must be utilized as fully as possible for maximum information transfer. This requires that the shape of the emission mask be designed to permit reasonable and practical information transfer without excessively expensive filtering requirements. At the same time, out-of-band emission limits must be judiciously selected to provide acceptable adjacent channel protection.

82. Proposal. The Refarming Notice proposed an emission mask for equipment operating on 5 kHz spaced frequencies in the 150-174 MHz VHF band that was identical to the mask currently specified in the Rules for the 5 kHz spaced frequencies in the 220-222 MHz band, except that the attenuations would be specified for frequencies referenced from the edge rather than the center of the authorized bandwidth. This would permit the same emission mask to apply to a single channel or to a wideband channel if contiguous channels were "stacked".

83. The Refarming Notice also proposed an emission mask for the 421-512 MHz UHF band that was designed to provide 40 dB of attenuation at the edge of the authorized channel, 50 dB at the edge of the adjacent channel's authorized bandwidth, and 65 dB after the center of the adjacent channel. The mask's emission attenuations were specified from the edge of the authorized bandwidth and thus, the mask was applicable to both 12.5 kHz and 6.25 kHz channel spacings.

84. Comments. Commenters advocating a 5 kHz channel spacing supported our proposed 5 kHz channel VHF mask.[152] SEA states that the proposed mask provides a "reasonable amount of inherent real-world protection" to adjacent channels and thus, would not require geographic separation between adjacent channels, regardless of technology or bandwidth.[153] UPS expresses support, stating that the proposed mask, which is based upon the existing 220 MHz mask, would allow a wide variety of modulations without requiring adjacent channel coordination.[154]

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[152] These included SEA, UPS, NTT, and Uniden. Securicor, an advocate of 5 kHz channelization, suggests that the out-of-band emission limits of the UK standard MPT 1736, be considered. Commenters supporting 12.5 kHz VHF channels (LMCC, Ericsson, and AAR) or 6.25 kHz VHF channels (GEC-Marconi and those supporting the APCO-25 concept) did not make specific reference to the 5 kHz mask proposed in the Refarming Notice.

[153] Comments of SEA at 14.

[154] Reply Comments of UPS at 3.

85. Commenters primarily favoring a 12.5 kHz channelization plan suggest a mask designed specifically for 12.5 kHz spacing that would be applicable to either VHF or UHF equipment and applicable to both analog and digital modulations.[155] TIA's comments also include a recommended mask for equipment operating on frequencies with 6.25 kHz channel spacing. TIA notes that its proposed masks are derived from committee work performed by various equipment manufacturers in APCO's Project 25, and are intended to provide a transition from current equipment to 12.5 kHz digital and analog equipment, while also supporting optional use of 6.25 kHz equipment.[156] TIA states that its suggested 6.25 kHz mask will allow single sideband analog modulation or the CQPSK digital modulation as proposed in APCO Project 25. GEC-Marconi states that they support our proposed 6.25 kHz mask, although their comments pictorially show a mask significantly different from our proposed mask.[157] Stone suggests a mask where the authorized bandwidth could equal the channel spacing provided a specific frequency stability is met, but that 50 dB of attenuation must be provided at the edge of the authorized bandwidth of the adjacent channel.[158] Ericsson recommends an emission mask for 12.5 kHz channels that would permit the use of TDMA modulation.[159]

86. Decision. Our decision in this proceeding is to establish narrowband channel bandwidths in both the 150-174 MHz VHF and 421-512 MHz UHF bands. We will, however, allow the use of equipment designed to operate on a 12.5 kHz channel bandwidth in each band. We have carefully considered the comments that discuss the various factors involved in developing appropriate emission masks for equipment operating with channel bandwidths narrower than 25 kHz. With respect to the emission mask proposed in the Refarming Notice applicable to equipment operating with a 12.5 kHz bandwidth, we concur with the comments that our proposed mask is too restrictive and that it would make existing

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[155] Comments of TIA at B1. Motorola and E.F. Johnson support the TIA proposal.

[156] Id. at 13.

[157] Comments of GEC-Marconi at Figure 5 for the 5 kHz channel mask and Figure 7 for the 6.25 kHz mask. These masks show a "brick wall" configuration at the edge of the proposed authorized bandwidth to 65 dB rather than, as proposed, 30 dB and then sloping to 65 dB in accordance with a specified formula.

[158] Comments of Stone at 7. Stone proposes that Commission permit the maximum authorized bandwidth, defined as containing those frequencies upon which 99% of the radiated power appears, extended to include any discrete frequency upon which the power is at least 0.25% of the total radiated power, to be equivalent to the channel spacing, if the frequency stability is kept to 0.1 ppm. The attenuation at the edge of the authorized bandwidth of the adjacent channel is required to be 50 dB.

[159] Ex parte filing from the Ericsson Corporation to William F. Caton, Federal Communications Commission, dated February 6, 1995 and addendum filed March 8, 1995.

or contemplated 12.5 kHz equipment generally non-compliant. Existing equipment would require redesign and the necessary modifications would not only be expensive but would delay the use of 12.5 kHz bandwidth equipment in the marketplace. Considering the technical discussions in the comments of adjacent channel protection, we agree that the 12.5 kHz emission mask proposed by TIA, although less restrictive than our proposed mask, provides acceptable adjacent channel protection. However, the TIA mask is designed to primarily accommodate only reduced deviation analog and digital FDMA modulations.

87. The emission mask submitted by Ericsson for equipment with a 12.5 kHz bandwidth appears to be more flexible than the TIA mask because it would not only permit the use of equipment that meets the TIA mask, but also equipment designed for wideband modulations, such as QPSK modulation. The basic difference between the Ericsson mask and the TIA mask is in the width of the mask's flat top region. The TIA mask, allowing for a 5 kHz authorized bandwidth, is flat until 2.5 kHz removed from the center frequency while the Ericsson mask, allowing for an 11.25 kHz authorized bandwidth, has a flat top that extends 5.625 kHz from the center frequency to accommodate the other modulation spectrums. There is some difference in the mask's skirt region, however, with the Ericsson mask providing less protection at the edge of the channel. We conclude, therefore, that the flat top region of the 12.5 kHz emission mask recommended by Ericsson will allow the use of any generally used modulation technique, and that the TIA suggested mask will provide better adjacent channel protection in the skirt region when compared to the Ericsson mask. We, therefore, are adopting for equipment designed to operate with a 12.5 kHz channel bandwidth in the 150-174 MHz and 421-512 MHz bands, a mask which incorporates the best attributes of the Ericsson and the TIA recommendations. Our adopted mask has the flat top characteristic of the Ericsson suggested mask and the roll off characteristic for the skirt region of the TIA suggested mask.

88. Regarding the narrowband emission mask, TIA states that their suggested 6.25 kHz mask was developed in support of APCO Project 25, and is also based upon our existing 220 MHz band mask as well as the 6.25 kHz mask proposed in the Refarming Notice. As with its 12.5 kHz mask, TIA's 6.25 kHz mask is intended for both analog and digital modulation. The only difference between our proposed mask and TIA's suggested mask is that the flat top of the TIA mask is extended to 3 kHz removed from the center frequency rather than the 2.5 kHz we proposed in order to accommodate a 9600 bps CQPSK modulation signal. Because there was no opposition to either our proposed or TIA's suggested mask, we are adopting the mask suggested by TIA for equipment that operates with a 6.25 kHz bandwidth in the 421-512 MHz band.

89. We disagree with Stone's suggested mask because the emission mask shape would be determined not only by the transmitter's frequency stability but also by the authorized bandwidth of an adjacent channel, which may vary depending upon the needs of the adjacent channel user. Separate type acceptance would then be required for each transmitter having different filtering to provide the needed mask shape. Also, licensing procedures would become complex because determination of an adjacent channel's bandwidth

would require adjacent channel coordination.

90. In the adopted emission mask rules, we are including provisions for equipment designed to operate on multiple contiguous channels. We are also specifying general requirements for instrumentation and procedures to be used when measuring equipment emissions. These are intended to provide general guidance to manufacturers. With the broad range of equipment modulations and system requirements that may be encountered, should our requirements prove inadequate or inappropriate, we will permit applicants for equipment type acceptance to utilize alternate procedures provided prior Commission approval is obtained.

(6) Frequency Stability.

91. Proposal. Following industry standards, the Refarming Notice proposed that transmitter frequency stability be specified in parts per million (ppm) rather than in percent of the carrier frequency. The Refarming Notice proposed a frequency stability of 0.1 ppm for 150-174 MHz and 421-512 MHz base stations, and stabilities of 1.5 ppm and 1.0 ppm for 150-174 MHz and 421-512 MHz mobile units respectively. The Refarming Notice further proposed to retain Part 90 frequency stability requirements for all other bands.

92. Comments. In its comments, TIA recommends differing frequency stabilities for the VHF and UHF bands for equipment designed to operate on 12.5 kHz or 6.25 kHz channels. SEA, supporting 5 kHz channelization in the VHF band, expresses support for the frequency stability schedule proposed in the Refarming Notice.[160] Other equipment manufacturers did not specifically address the frequency stability issue.

93. Decision. Narrower channel spacing increases the importance of frequency stability to reduce adjacent channel interference. As mentioned previously in the discussion on emission masks, a properly designed emission mask must take frequency stability into consideration. As stated by TIA, their recommended frequency stability requirements for 12.5 kHz equipment are based on the performance of equipment that has been operating for a number of years in Europe and Asia in the same frequency bands, thus demonstrating that the frequency stability recommendations, coupled with TIA's recommended emission masks, will provide adequate adjacent channel interference protection. Therefore, we conclude that TIA's proposal provides a reasonable transition from current equipment to advanced 12.5 kHz digital and analog equipment while also supporting the optional use of 6.25 kHz equipment. Accordingly, we adopt the frequency stabilities as proposed by TIA for base and mobile stations designed for operation with either a 12.5 kHz or 6.25 kHz bandwidth in the 150-174 MHz and 421-512 MHz bands. These frequency stabilities are the minimum acceptable and are listed in the table of § 90.213(a). Manufacturers may choose to produce equipment with greater frequency stability.

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[160] Comments of SEA at 15.

94. Although the Refarming Notice proposed frequency stabilities for the 150-220 MHz band, our decision herein does not include a frequency stability for the 216-220 MHz band. Operation in this band is secondary to Federal Government operations, and equipment operating in the 216-220 MHz band is required to comply with Federal Government technical standards. Also, we are retaining the current base and mobile station frequency stabilities in the 220-222 MHz band.

(7) **Spectrum Efficiency Standards.**

95. Proposal. The purpose of a spectrum efficiency standard is, in combination with a channelization plan, to expand capacity in a band of frequencies by requiring efficient operation. Such a standard should allow equipment manufacturers to offer a wide array of technologies using various bandwidths to satisfy diverse user needs. In the Refarming Notice, we proposed spectrum efficiency standards that would permit the use of non-standard bandwidths provided that such use is at least as efficient as narrowband technology.[161] Since a communications link may convey either voice or data, two different formulas were proposed. With respect to voice transmissions, our efficiency standard required at least one voice circuit per channel being combined. For example, if four 6.25 kHz channels are combined to enable a 25 kHz TDMA technology, then the resulting system must contain at least four voice slots. Regarding an efficiency standard for digital technologies and data applications, we proposed a requirement of at least 4800 bits per second per communications link.[162] These proposed spectrum efficiency standards were intended to increase technical flexibility.

96. Comments. Generally, this concept received strong support in the comments.[163] In their "User Coalition Plan", the User Associations state that "... licensees would be permitted to exceed the maximum channel spacings, ... upon a demonstration that their proposed system would operate with an efficiency that is equivalent to, or greater than the efficiency normally achievable in the stated bandwidth."[164] Few comments were received on our proposed efficiency standard for voice systems; most were in regard to our proposed standard for digital systems. Although the general approach is endorsed by the majority of commenters, many differed on how to define spectrum efficiency. Ericsson, for example, stated, "...the most germane measure of spectrum efficiency... is measured in terms of quantity of communications achieved per unit of occupied spectrum as a function of the

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[161] Refarming Notice, text under Appendix A, "Spectrum Efficiency Standards."

[162] As proposed, a communications link was 5 kHz in the 150-174 MHz VHF band and 6.25 kHz in the 421-512 MHz UHF bands.

[163] Comments of E.F. Johnson, SEA, GEC-Marconi.

[164] Letter from User Associations to William F. Caton, Federal Communications Commission, dated January 13, 1995.

geographic area occupied by the signal and the time required to achieve the communications."[165] Others strongly agreed with our approach. For example, SEA notes that "the logistics of the implementation of any alternative to the Commission's enforcement of a simple standard is conspicuously absent from the comments."[166] GEC-Marconi recommends a standard of 1.28 bits/second/Hertz as a long term efficiency objective.[167] Finally, we note that the comments contained considerable discussion on potentially attainable spectrum efficiencies. Other possible formulas suggested in the comments suffer from the defect that the suggested spectrum efficiency measure would depend on the specific use, thus creating a significant compliance problem. For example, information per second per hertz depends on the exact nature of the information being communicated. Even a less elusive measure like bits per second per hertz per square kilometer depends on antenna gain and height, which varies from applicant to applicant.

97. Decision. After considering the comments on this issue, we are adopting our proposal contained in the Refarming Notice with minor modification. Although different efficiency standards were proposed for the VHF and UHF bands, we are adopting a common standard for all the refarming bands. In accordance with the transition dates for equipment in the 150-174 MHz VHF and 421-512 MHz UHF bands, we are adopting a spectrum efficiency standard of one voice channel per 12.5 kHz of channel bandwidth for equipment type accepted after August 1, 1996, and a spectrum efficiency standard of one voice channel per 6.25 kHz for equipment type accepted after January 1, 2005. Additionally, after August 1, 1996, equipment designed for data operation that uses more than a 6.25 kHz channel bandwidth, must meet a minimum efficiency standard of at least 0.768 bits per second per Hertz.[168] At the chosen standard of 0.768 bps/Hz, the 6.25 kHz equipment will have a data rate of 4800 bps, and the 12.5 kHz equipment will have a data rate of 9600 bps. These are standard data rates. Based on the comments, we believe that this standard is readily attainable. This standard will be incorporated into the type acceptance process by having equipment manufacturers certify as part of their application for type acceptance that their equipment meets the spectrum efficiency standard. Therefore, licensees and new applicants would be assured that any equipment they purchase would comply with the spectrum efficiency standard.

(8) Itinerant and Color Dot Frequencies.

98. Proposal. The Refarming Notice proposed that 45 VHF and UHF frequencies

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[165] Comments of Ericsson at 15.

[166] Reply Comments of SEA at 6.

[167] Comments of GEC-Marconi at 14.

[168] Equipment designed for voice and data operation must meet the efficiency standards for both voice and for data.

be designated specifically for itinerant operations at unspecified temporary locations and that users of these frequencies would not have any protection from other itinerant co-channel licensees.

99. Comments. There was no opposition to our proposal for use of the itinerant frequencies. Ritron, in its comments, recommends that we retain certain low power and itinerant frequencies in the Business Radio Service as conventional FM (12.5 kHz) channels for "very low tier, low cost, entry level communications".[169] These frequencies are commonly referred to in the marketplace as "color dot" channels[170] and are becoming increasingly popular. The majority of radios operating on these channels are relatively inexpensive, one-watt handheld portables, and are readily available from discount retailers and mail order sources. The comments indicate that this type of equipment serves an important need. We concur that there should be entry-level, economical equipment made available to licensees who do not have a need for more sophisticated and more expensive land mobile radios. Therefore, we will reserve the frequencies currently designated for low power and itinerant operations for continued use in this manner.

100. Further, in reply comments, Motorola recommends that additional low-power itinerant channels be created. Motorola states that these channels "serve a variety of business communications needs as evidenced by the incredible loading that the itinerant channels currently support", and "that there is a growing demand for low-cost and low-power consumer portable land mobile equipment to serve individual recreational needs"[171] Motorola recommends that the Commission consider designating several channels for this use.

101. Decision. We agree with these assessments. Accordingly, we are making six additional frequencies in the 150 MHz band available to the Business Radio Service for low-power and itinerant operations. These are: 151.700 MHz, 151.760 MHz, and 154.5275 for itinerant use, and 151.820 MHz, 151.880 MHz, and 151.940 MHz for low-power use. Operation on these new low power frequencies will be limited to a maximum channel bandwidth of 12.5 kHz and a maximum output power of 1 watt. Also, after January 1, 2005, we will continue to allow type acceptance of 12.5 kHz single mode radios that are designed to only operate on any of the color dot frequencies and have an output power of less than 2 watts.

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[169] Comments of Ritron at 4 and 6.

[170] The operating frequencies of these radios are designated by a colored dot or star attached to the radio. Channels currently designated by manufacturers as color dot or star frequencies are: 151.625 MHz (Red dot), 154.570 MHz (Blue dot), 154.600 MHz (Green dot), 464.500 MHz (Brown dot), 464.550 MHz (Yellow dot), 467.850 MHz (Silver star), 467.875 MHz (Gold star), 467.900 MHz (Red star), and 467.925 MHz (Blue star). The frequencies 469.500 MHz and 469.550 MHz are also designated as itinerant in § 90.75(b).

[171] Reply comments of Motoroia at 25.

(9) Type Acceptance.

102. As licensees transition to narrowband technologies, a primary concern of many manufacturers is that they be able to provide continued support to their existing customer base. With respect to this rule part and proceeding, a grant of type acceptance will be required for new multi-mode, or narrowband equipment. The new grant of type acceptance may cover a new transmitter design and/or upgraded units.[172] Existing wideband (25 kHz) units that have the inherent capability for either multi-mode or narrowband operation may have the current grant of type acceptance modified to show the additional capability by filing a modification request which demonstrates that the original unit complies with the new technical requirements applicable to multi-mode or narrowband operation.

103. In cases where manufacturers have developed a conversion kit to retrofit existing wideband equipment and cause the modified unit to conform to the new technical requirements for new multi-mode or narrowband operation, we will allow field modifications to add multi-mode or narrowband capability to equipment currently installed. So that this equipment can be recognized as having the revised capability, the modifying party, typically the manufacturer or its representative, must replace the existing FCC ID label with a new label that corresponds to the FCC ID of the associated new transmitter which was type accepted with the multi-mode or narrowband capability.

(10) Miscellaneous Technical Issues.

104. Emission classifications. We continually receive inquiries concerning emission designator symbols from applicants filling out application forms. Therefore, to assist applicants in selecting the proper symbols, we are adding an introductory paragraph in 47 C.F.R. § 90.207 that defines in simple terms the most commonly used land mobile radio emission classification symbols and makes reference to the detailed discussion of emission classifications contained in 47 C.F.R. § 2.201.

105. Modulations. The Refarming Notice proposed that modulations other than frequency modulation (FM) could be utilized by equipment on the narrowband channels, and that frequency deviation limits, which are applicable only to FM, will no longer be specified for equipment designed to operate on these channels. Additionally, the new emission mask requirements make the need for a frequency deviation limit superfluous for FM equipment, and irrelevant for non-FM equipment. Therefore, because no comments opposed this proposal, we are eliminating references to frequency deviation limits for equipment operating in the 150-174 MHz and 421-512 MHz bands.

106. Spread spectrum. In the Refarming Notice, we proposed to permit the use of

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[172] Upgraded units are those units that are converted in the field to conform to a new transmitter design and performance specification.

direct sequence spread spectrum devices for public safety use during covert operations. Current Part 90 rules permit only frequency hopping spread spectrum to be used in the Police Radio Service. Under Part 15 of the Rules, both direct sequence and frequency hopping techniques may be used. Since there was no opposition to our proposal, we are amending Section 90.19 of the Rules to permit the use of direct sequence spread spectrum transmitters in the Police Radio Service.

107. Transmitter transient frequency criteria. Radio transmitters, when keyed on, require a very short period of time (in milliseconds) to "warm-up" and attain their designed operating frequency. During this short period of off-frequency operation, noise "chirps" are transmitted. A similar transient frequency behavior occurs when the transmitter is keyed off. Transmitters designed for digital transmissions produce in-band signals very close to an adjacent channel. Thus, noise "chirps" can cause interference to adjacent channel operations. The Refarming Notice proposed certain criteria to limit the amplitude of this type of noise. The comments indicate support for limiting these emissions. E.F. Johnson states that "[t]he Commission's regulations will insure that substandard equipment that could cause interference to other users will not be type-accepted."[173] The comments also indicate that since our original proposal, the industry has adopted voluntary standards, contained in EIA/TIA Standard 603, to limit these "chirps." Motorola "... points out that the EIA/TIA have already addressed the issue of transient frequency behavior in its publication SP-22108."[174] Motorola further states that "... since the industry has already addressed this matter through the adoption of voluntary standards, an FCC rule is unnecessary."[175] We disagree with Motorola. In order to assure that "chirps" do not cause excessive interfere to other land mobile licensees and to television receivers operating in adjacent bands, manufacturers must limit "chirps" in their equipment. Therefore, we are adopting standards similar to those used by industry for transient frequency behavior for equipment designed to operate on 25, 12.5, or 6.25 kHz channel bandwidths.

108. Exemption from technical standards. Section 90.217 of the Rules exempts transmitters used at stations licensed in the Business Radio Service from some technical standards of Part 90, Subpart I, if the transmitters employed do not exceed 120 milliwatts in output power. These transmitters, however, must meet limited out-of-band emission and frequency stability criteria. Section 90.217 has been modified to include additional out-of-band emissions limitations that are appropriate to the narrower channel bandwidths being established.

109. Lastly, we adopt several minor editorial changes to Part 90 to correct typographical errors, omissions, and obsolete text.

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[173] Comments of E.F. Johnson at 25.

[174] Comments of Motorola at 34.

[175] Comments of Motorola at 34 and 35.

V. FURTHER NOTICE OF PROPOSED RULE MAKING

A. Introduction

110. This Further Notice of Proposed Rule Making (FNPRM) explores methods to promote more efficient and effective use of the PLMR bands below 800 MHz. We do not believe that the current shared regulatory environment contains the proper incentives to encourage efficient spectrum usage. We believe that introducing market-based incentives into these bands will help to encourage more efficient spectrum use while allowing users to make the equipment choices which best address their needs by attaching an economic cost to inefficient use of the spectrum and promoting the use of more efficient technologies. The user community will ultimately benefit from more efficient use of spectrum through the availability of more channels and better quality service. This FNPRM proposes three options to introduce market forces into these bands: exclusivity, user fees, and competitive bidding. We seek comment on each of these options and believe that the information we gather will assist us in developing and implementing an overall strategy on how to promote greater efficiency in these bands.

111. The spectrum in the PLMR bands historically has been available on a shared use basis.[176] The environment that has emerged is characterized by unlimited sharing of the spectrum by over 500,000 licensees with over 12 million mobile units.[177] Because of the significant and varied spectrum use, the PLMR bands have become highly congested and there is a substantial risk that service in these bands will deteriorate to unacceptable levels. Unfortunately, in this shared use environment, PLMR users generally have little incentive to economize on spectrum use because users do not pay for their spectrum, cannot realize the benefit of more efficient use, and generally share their frequency assignments with a number of other users. Instead, other users gain most of the benefits of such conservation. Shared use of spectrum also precludes the use of spectrum efficient technologies, such as trunking and time division multiple access (TDMA) because they generally require centralized channel control. For example, trunked operation (based upon computerized queuing of calls) cannot coexist with other users employing conventional technologies because conventional transmissions do not interact with the automatic equipment that queues trunked messages. Thus, interference between trunked operations and conventional operations prevent their

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[176] Pursuant to Section 90.173(a), 47 C.F.R. § 90.173(a), channels below 470 MHz are shared and additional licensees may be added at any time.

[177] Small businesses represent a significant portion of these licensees due to the availability of low cost radios. PLMR channels are used for a variety of purposes including the transmission of voice and low speed data, paging, and remote control.

coexistence on the same channels.[178] Similarly, TDMA technology requires that all equipment on the same channels interact so that the time is shared among all the radios.

112. We have tentatively concluded that the introduction of market-based incentives such as exclusivity with the right of resale, spectrum fees, and competitive bidding will help address the fundamental inefficiencies inherent in an unlimited shared-use spectrum environment. The application of such market based incentives to PLMR spectrum allocation and assignment will provide greater flexibility in technology choices and open possibilities for increased innovation into the PLMR bands, which will ultimately better serve private user's needs.

113. In this FNPRM, we seek comment on how to best achieve the introduction of exclusivity on channels in the PLMR bands, and to explicitly permit the leasing of excess capacity on these exclusive channels. We believe that offering users the option of exclusivity with the right to resell excess capacity if they agree to convert to narrowband technology by a specified date will promote the use of more efficient technologies such as trunking and TDMA, which are incompatible with the use of other traditional technologies on the same channel. In addition, affording users the opportunity to obtain exclusivity will enable them to benefit directly from the increased capacity which results from their conversion to more efficient technologies, thus encouraging more rapid transition to narrowband technology. In this regard, users will be more likely to install trunked systems if they are certain that additional users, who might interfere with their trunked systems, would not be licensed on their channel. Our experience with the spectrum above 800 MHz supports this theory. The introduction of exclusivity into the 800 MHz bands facilitated and encouraged the use of more spectrum efficient technologies and equipment. We seek here to provide users of the PLMR bands with that same flexibility to use the most advanced and efficient technology available.

114. We also seek comment on how a system of user fees can be used in these bands to encourage licensees to make the most efficient and effective use of the spectrum. Under this approach, users would pay a fee based on the estimated value of the spectrum. The spectrum fee would be calculated based on the area and population covered, and the amount of spectrum used. This type of a user fee structure would attach an economic cost to inefficient spectrum use, thereby motivating users to increase their efficient use of the spectrum. Although the Commission does not currently have statutory authority to impose such a fee structure, this option may be the most effective way to encourage efficiency in the PLMR bands while recognizing the varying needs of the incumbent users. In addition, the underlying budgetary assumptions in the Senate Budget Committee's FY 1996 Budget Resolution proposes to grant the FCC expanded authority to impose fees to encourage more

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[178] Subpart S operations above 800 MHz have separate frequencies set aside for trunked and conventional use. General Category channels above 800 MHz set aside for conventional use may only be trunked with the consent of all users in a geographic area.

"efficient" and "effective" use of the spectrum. Moreover, the user community itself has recognized that market-based user fees may be appropriate in these bands.[179] Manufacturers have also recognized the benefits of market-based user fees in these bands.[180] For the forgoing reasons, we believe it is appropriate to seek comment at this time on whether such a fee structure would be an appropriate mechanism to encourage greater spectrum efficiency in the PLMR bands below 800 MHz and if so, how such fees should be calculated. We believe that seeking further comment on the imposition of user fees at this time will enable the Commission to consider how such fees can best be implemented in the PLMR bands, so that if fee authority is granted, we will be able to act quickly to implement such authority.

115. We seek comment on introducing competitive bidding into these bands as an alternative to user fees. Specifically, we seek comment on a proposal to create geographic overlay licenses and use competitive bidding as the assignment mechanism for these overlay licenses. Competitive bidding of overlay licenses could promote efficiency by allowing the marketplace to determine the value of spectrum and by awarding licenses to those who value them most highly, thus ensuring that spectrum will be put to its highest value use. As with exclusivity, competitive bidding of overlay licenses attaches a cost to inefficient spectrum use. Our experience with competitive bidding to date, shows that it also promotes economic and market-based business decisions and fosters speedy licensing.[181]

116. The Commission's current auction authority does not permit the use of competitive bidding to assign private licenses because these licenses are not mutually exclusive and the principal use of the spectrum does not involve the provision of service to subscribers for a fee.[182] However, expanded auction authority which could include private

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[179] Letter from Harry C. McPherson, Thomas J. Keller, John B. Richards, and Mark E. Crosby to Alice M. Rivlin dated February 2, 1995 at 3. "The Administration should carefully consider . . . whether additional user fees may be appropriate to ensure that the Federal government receives a fair return for private wireless use of the scarce national spectrum resource."

[180] See *ex parte* letter from Linear Modulation Technology (LMT) dated May 16, 1995 at page 1. "LMT believes that license fees for PLMR systems . . . would allocate the true costs of PLMR service and spectrum usage in an economically-efficient manner."

[181] On average, winning bidders in the Commission's spectrum auctions have received their licenses in four months.

[182] In the matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order, PP Docket No. 93-253, 9 FCC Rcd 2348 at para. 13 (1994)

wireless users is proposed by the Administration[183] and the Senate.[184] Accordingly, we believe that it is appropriate at this time to seek comment on how auctions could best be implemented for PLMR licenses, if such authority is granted.

117. Additionally, we seek comment on the treatment of public safety users with respect to market-based incentives. Public safety users are charged with the protection of life and property, and the Commission is committed to ensuring that such users have access to spectrum to perform their critical function. We seek comment on exempting public safety users from spectrum fees and competitive bidding, or developing a reduced fee structure and a protected auction environment for these users.

B. Exclusivity

118. As we have indicated throughout this proceeding, we believe that exclusivity will provide the proper incentives for users to efficiently use spectrum. Exclusivity enables users to introduce more spectrally efficient technologies, such as trunking, without the concern that other users will be licensed on their channels using conventional equipment that may interfere with their trunked equipment. In the PLMR bands above 800 MHz, the Commission implemented the use of exclusive frequencies in part to encourage spectrum efficient technologies such as trunking.[185] Moreover, without exclusivity, other spectrum efficient techniques, such as cellular radio and some digital multiple access techniques are inefficient or impractical because users are not able to benefit from the use of these more advanced technologies.

119. We have tentatively concluded that the introduction of exclusivity is important in these bands because it will make users realize directly the opportunity cost of inefficient spectrum use. Licensees will have greater incentive to convert to more efficient technologies if they are granted exclusive rights to a particular channel or channels in a given area.[186] While a licensee with exclusive use of a channel may continue to be inefficient in the short term, over time rational licensees will seek to maximize the value of "their" spectrum in the

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[183] See United States Office of Management and Budget, Budget of United States Government, Fiscal Year 1996, pages 255-256.

[184] Senate Committee on Budget, Concurrent Resolution on Budget for FY 1996 to accompany S. Con. Res. 13, S. Rep. No. 104-82, 104th Cong., 1st Sess. 199-200 (1995).

[185] Report and Order, PR Docket No. 89-552, 56 Fed. Reg. 19598 (1991)

[186] See Evan R. Kwerel and John R. Williams, *Moving toward a Market for Spectrum*, Cato Review of Business & Government, 1993, Number 2; Ronald Coase, *The Federal Communications Commission*, Journal of Law and Economics, vol. 2, 1-40 (1959).

same way they would otherwise seek to maximize the value of an asset such as land. An essential element of exclusivity, however, is the right to resell excess capacity. Allowing exclusive licensees to resell excess capacity is necessary to ensure that the spectrum can be efficiently used by another party if that party has a higher valued use for the spectrum. Higher valued uses can be achieved either through alternative applications or through better operational or financial management (i.e., economies of scale which result from consolidation of multiple smaller operations). In addition, resale will ensure that the price for spectrum use remains low and that new licensees retain the ability to use spectrum.

120. In this FNPRM, we propose to provide users the option of obtaining exclusive channel assignments if they agree to convert to narrowband equipment by a specified date. Such exclusivity will facilitate the deployment of new technologies and encourage more efficient spectrum use. We propose to allow licensees who agree to convert to narrowband technologies within five years from the effective date of this item to enter into contractual agreements with neighboring co-channel licensees to establish areas of exclusive assignment, thereby precluding new co-channel licensees from being licensed, except by mutual agreement of all parties to the exclusivity plan. We also propose to allow licensees, who are parties to an exclusivity agreement and who have converted their system to narrowband technology, to have the right to resell excess capacity.

121. Refarming Notice. Generally, the Commission's Rules governing the PLMR bands below 800 MHz do not provide for channel exclusivity.[187] Instead, they provide for unlimited shared use. *De facto* exclusivity may exist where current channel occupants have operations that may not be readily shared by others, or where a channel is so congested that it is not a viable alternative for prospective new operations. We first discussed introducing exclusivity into the PLMR bands in the Notice of Inquiry. Based on the comments generated by the Notice of Inquiry, we noted in the Refarming Notice that traditional exclusivity would not be suited to this highly shared environment.[188] Instead, we proposed to introduce a type of shared exclusivity, referred to as Exclusive Use Overlay (EUO), below 470 MHz, which would enable users to protect their radio environment and limit future assignments. Pursuant to the EUO plan, new and existing licensees would be granted "the exclusive right" to add to the existing radio use on a given frequency in a specific geographic area. The exclusive use overlay licensee would have sole access to the "current and future residual communications capacity" on those channels in that market. In order to obtain an exclusive overlay license, an applicant on a channel with no existing licensees was required to employ highly efficient equipment based on an efficiency standard set above the level of currently available equipment. [189]

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[187] The current rules allow for exclusive assignments in the 470-512 MHz band if a certain number of mobiles are maintained.

[188] Refarming Notice at para. 12.

[189] Refarming Notice at Appendix A.

122. Specifically, under the EUO a licensee could convert channels to exclusive use and thereby limit co-channel assignments within 80 km (50 mi) of a base station if other co-channel licensees, as determined by loading, concurred, and the following loading standards were met: 70 mobiles per channel within the New York and Los Angeles metropolitan areas; 50 mobiles per channel in 73 other geographically broad markets; or 20 mobiles per channel in the rest of the country. In this manner, we hoped to provide a stimulus for licensees to employ more efficient technologies, such as centralized trunking, which generally require exclusive assignments.[190] In addition to providing this option for licensees of large systems, we proposed allowing the EUO mechanism to be invoked when a licensee could show that failure of a system would create an imminent danger to public safety.[191] Finally, we proposed to exclude a number of channels for general business use from employing this option.

123. Comments. Our EUO proposal received broad commenter support. However, some commenters argue that we should exercise caution and noted the benefits of shared spectrum. In support of the exclusivity option, the Coalition of Industrial and Land Transportation Land Mobile Radio Users state that "[i]nterference-free frequency assignments are necessary for safety-related land mobile communications systems.... Exclusive assignments are ... also necessary for advanced technology systems...."[192] Ericsson supports the EUO plan as proposed. Others, such as NABER and ATA however, support exclusivity but note that sufficient loading requirements are necessary to maintain efficiency.[193] Other commenters generally supporting our EUO proposal include: LMCC, Arizona Department of Public Safety, Arizona Chapter of APCO, and API.[194] A few commenters indicate that the proposal is not actually exclusivity and suggest that the Commission avoid using the term "exclusive."

124. AMRA, who opposes our proposal to designate some frequencies for exclusive use, argues that all frequencies should be available for shared and exclusive assignments.[195]

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[190] Trunking provides a three fold increase over conventional systems in spectrum efficiency. See NTIA report 94-311.

[191] For example, failure of a certain railroad radio system could directly lead to railroad accidents. Refarming Notice at Appendix A, footnote 13.

[192] Comments of the Coalition of Industrial and Land Transportation Land Mobile Radio Users at 20.

[193] See, for example, comments of ATA at 8.

[194] Comments of LMCC at 22-23; Comments of Arizona Department of Public Safety at 9-10; Comments of Arizona Chapter of APCO at 10-11; Comments of API at 9-12.

[195] Comments of AMRA at 8.

In opposing our exclusivity proposal, Motorola emphasizes that shared channels are an efficient way to meet the needs of huge numbers of small PLMR users. Motorola notes that in urban areas it is not uncommon for several hundred mobile units to be shared on a single frequency, easily exceeding the exclusivity requirement of 70 mobiles per channel for systems operating above 800 MHz.[196] NABER also expresses concern that for-profit carriers would unduly benefit from the EUO proposal at the expense of small user-owned private land mobile systems.[197] Public safety and safety-related services recognize the necessity of having interference-free assignments; however, APCO, AASHTO, and AAR generally oppose the proposal due to loading requirements.

125. Discussion. Channel exclusivity generally translates into better service for the licensee and is necessary to facilitate the introduction of spectrum efficient technologies, e.g., centralized trunking and TDMA. Exclusivity also creates incentives to use spectrum efficiently by making users realize the opportunity cost of inefficient spectrum use. Additionally, channel exclusivity serves the needs of major radio system operators, i.e., those seeking to install large, wide area networks. Exclusivity creates "ownership" rights, which motivate licensees to make more efficient use of spectrum because the advantages gained from exclusivity accrue directly to the licensee. Whereas, on shared use channels the benefits and increased capacity gained if one licensee installs more spectrally efficient equipment are shared by all the channel's users. Therefore, we conclude that the option of exclusive licensing will be an important element in our overall strategy to increase efficiency in the PLMR bands.

126. The introduction of exclusivity into these bands is complicated by the fact that this spectrum has historically been licensed on an unlimited shared basis. Thus, additional users currently may be added at any time.[198] As a result, many of the channels, particularly in large urban areas have become severely congested. On shared channels, the advantages gained if one licensee is spectrum efficient are shared by all the licensees on the channel. In certain radio services the number of existing licensees per channel is quite small. On such channels, existing licensees would be in a position to quickly agree to maximize the value of the channel by converting to more efficient technology and thereby obtain exclusivity. Where channels are congested with numerous licensees, implementing advanced technologies may be quite difficult. The need to relieve congestion and the ability to cap the number of new co-channel users should, however, encourage coordination among existing users to implement advanced technology. Moreover, while the introduction of exclusivity on these channels will likely reduce the number of future licensees on certain channels, it will increase the efficient use of the spectrum through the introduction of more advanced technology and result in improved service. Thus, while we recognize that introducing exclusivity will in

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[196] Reply Comments of Motorola at 26 and 27.

[197] Comments of NABER at 17.

[198] See footnote 176.

some ways change the profile of these bands, we believe that the overall efficiency gains and improvements in the quality of service, will outweigh losses in the volume of users. In any event, applicants seeking licenses for new systems would have the option of seeking assignments on other shared bands or paying to lease excess capacity from exclusive licensees. We also believe that, in this environment, licensees in other bands will have incentives to implement advanced technologies that can be used to provide service, for a profit, to new PLMR users.

127. While a majority of commenters supported the idea of exclusivity, the EUO plan proposed in the Refarming Notice was not sufficiently specific and raised a substantial number of additional questions that warrant further comment. For example, what efficiency standard should be required before users are eligible to apply for exclusivity? Over what period of time should users be required to convert to more efficient technology? Over what geographic areas should exclusive licenses be granted? Should the option of exclusivity be limited to existing users? Should exclusivity be permitted on all bands or should some bands be reserved for shared use so that all new requests for spectrum assignments can be accommodated? What rules should be adopted regarding adjacent channel interference between shared and exclusive channels? How should exclusivity be implemented? How will negotiations between existing users be effected by consolidation of the radio services. Detailed comments addressing these important issues are necessary before the Commission can adopt a workable exclusivity plan.

128. Since Congress is currently considering expanding the Commission's auction authority, we believe that it is appropriate to seek further comment on whether our exclusivity proposal should be modified if auction authority is obtained for these bands. Similarly, Congress is currently considering granting the Commission authority to impose fees to encourage more efficient use of the spectrum. We believe that imposing user fees in conjunction with exclusivity may be the best way to achieve greater efficiency in the PLMR bands. Accordingly, we seek further comment on how such fees should be structured for exclusive grants as opposed to licenses for shared use. In addition, a plethora of new commercial mobile wireless services and technologies are being introduced that may serve as economically efficient alternatives to existing private systems. For example, cellular, SMRs, paging and PCS may provide efficient alternatives to existing private services. Consequently, we seek comment on how these commercial services can be used to fulfill some of the needs of private wireless users. Finally, we seek comment on how exclusivity should be administered in light of the consolidation of the radio services.

129. FNPRM. For the purposes of this FNPRM, we propose a modified version of the EUO proposal that is not based on loading, but rather provides economic and operational incentives for existing licensees to convert early to narrowband (NB) technologies.[199] This

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[199] By narrowband (NB) technology, we mean equipment designed to operate on channel bandwidths of 7.5 kHz or less at VHF and 6.25 kHz or less at UHF or any equivalent

"shared exclusivity" plan will provide an option for existing licensees in the four refarming bands (150-174, 421-430, 450-470, and 470-512 MHz) to develop arrangements that facilitate the deployment of efficient technologies and increase their quality of service.[200] Under the shared-exclusivity plan, we propose the following provisions for licensees:

(a) Licensees would have the option to enter into contractual agreements with neighboring co-channel licensees to establish areas of exclusive assignment, thereby precluding new co-channel licensees from being licensed within the area, except by mutual agreement of all parties to the exclusivity plan. To achieve this cap on new assignments, all licensees on the channel must agree to convert to narrowband technology. Under our proposal, a single existing licensee may request exclusivity over the extent of its service area if there are no other licensees in the area.

(b) These exclusivity agreements must be filed with the appropriate frequency coordinator no later than August 31, 2000.[201] To provide licensees a reasonable amount of time to reach an agreement, we propose to allow licensees to request that frequency coordinators stop processing any requests for new co-channel assignments in their geographic area for a period of 90 days while an agreement is being negotiated. Ninety days appears to strike a fair balance between the time required for licensees to negotiate a mutual agreement and the time that would not cause any prolonged delay in licensing, should a mutual agreement not be reached. The licensees participating in such a mutual agreement must also file to modify their licenses.

(c) Licensees that are parties to exclusivity agreements and have completed the conversion of their systems to narrowband technologies would be granted the right to lease any excess capacity created on their channels. This will permit licensees to capture some of the benefits of their investment in spectrally-efficient technology as well as ensure that spectrum is made available for other higher value uses.

130. Exclusivity will provide a strong incentive for early transition to narrowband

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technologies.

[200] It is important to note that the term "exclusivity" as it is used in this proceeding is different from the way the term is used in the PLMR bands above 800 MHz. Above 800 MHz, exclusivity means that there are no other co-channel licensees within a certain mileage radius of the base station. This can be assured since exclusivity was permitted when the spectrum was first made available for PLMR use. The term "exclusivity" here applies to protection from (e.g., a cap on) future licensees. All existing licensees can remain on their channel on a co-primary basis and add additional mobile units.

[201] The licensee(s) must inform all coordinators who have responsibility over that frequency or frequencies, regardless of the radio service in which they are applying.

technologies because users can benefit directly from the additional capacity created, as well as from better quality service. In addition, exclusivity will enable existing licensees to employ certain spectrum efficient technologies and promote market-based decisions.

131. We seek comment specifically on the following issues as they relate to exclusivity: (1) What amount of time should licensees who agree to convert to narrowband technology in exchange for exclusivity be allowed to actually convert their systems?; (2) Should exclusivity be available on all channels or should some channels be reserved for shared use?; (3) Should single entities be permitted to obtain exclusivity?; (4) Should the exclusivity option be limited to existing users?; and (5) What standards for narrowband efficiency should be required for exclusivity? Comments should focus on how to best implement exclusivity and how to remedy imperfections in the plan we have outlined.

132. We propose that to determine the geographic area in which we will grant exclusive licenses, the composite service area of all licenses that are a party to the agreement be used. Specifically, we propose that the geographic service area will be assumed to encompass a circular area[202] around each base station of all parties to the agreement. Pursuant to this proposal, licensees would be permitted to cap future co-channel assignments within this "exclusive" service area. In order to prevent interference to users within exclusive service areas, we propose to require future co-channel licensees to meet minimum distances to all stations participating in exclusivity agreements.[203] Additionally, we propose that if a licensee is participating in an exclusivity agreement and expands its system outside the exclusive service area, the portion of its expanded service area that falls outside of the exclusivity service area will not be afforded any protection from existing or future co-channel licensees unless the agreement is modified to denote a new "exclusive" service area. We seek comment on these proposals and encourage the submission of alternative proposals as well.

133. We propose that all "shared exclusivity" agreements be processed by a frequency coordinator and maintained on file. To reduce the filing of exclusivity agreements by entities that have no real intention of implementing such agreements, we also propose that each notification of an exclusivity agreement include a detailed plan on how the participants will implement narrowband systems. This plan must include benchmarks by which we can measure the licensee's progress towards fulfilling their plans. In the event that licensees fail to meet these benchmarks, we propose to cancel the exclusive grant and convert the licenses to shared use. We request comment on appropriate guidelines for measuring this progress.

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[202] The service area would be based on the tables which relate power heights and antenna levels.

[203] The proposed minimum distance separation tables are based on the LMCC safe harbor tables.

134. We further propose to permit licensees who choose to implement this exclusivity option the right to lease excess capacity on their systems. We believe that affording licensees the right to lease excess capacity will create economic incentives to encourage more efficient use of the spectrum by attaching an opportunity cost to inefficient spectrum use. We propose to allow licensees who choose the exclusivity option to lease excess capacity to any party without restriction in order to promote more flexible use of this spectrum. We seek comment, however, on whether such leasing arrangements should be limited to PLMR eligibles in order to ensure that sufficient spectrum is available to satisfy the needs of the PLMR community. Our preliminary conclusion is that restriction on such arrangements is not necessary because we believe spectrum will go to its highest value use if it is available to the widest possible number of users. We do not believe that it will be necessary to regulate the prices for spectrum that is leased in these bands since these channels will compete with a wide variety of wireless communications options. Instead, we believe that it is preferable to allow the marketplace to determine the value of the use of this spectrum.

135. Finally, we seek comment on whether these proposals for PLMR exclusivity will affect whether traditional PLMR users, who seek to lease excess capacity, are considered commercial mobile radio service (CMRS) providers as defined in the Commission's CMRS rule making proceeding.[204] We tentatively conclude that licensees who lease excess capacity will have that aspect of their operations regulated as CMRS. We seek comment on our tentative conclusion that the lease of excess capacity will change the regulatory status of that aspect of a PLMR entity's business. We also seek comment on how our exclusivity proposals should be modified if legislation is passed which grants the Commission authority to auction spectrum in the PLMR bands or to impose a user fee structure, as discussed more fully below.

C. User Fees

136. Another proposal for introducing market-based incentives into the PLMR bands is to implement market-based user fees as an alternative to, or in conjunction with, competitive bidding and exclusivity. We previously sought comment on the use of such fees in the Notice of Inquiry[205] and we continue to believe that such market-based user fees are a desirable means for encouraging greater spectrum efficiency. As we previously noted, the imposition of a market-based user fee would associate a direct economic cost with inefficient spectrum use. Under our current proposal, users would pay a spectrum fee based on how

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[204] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-352, Second Report and Order, 9 FCC Rcd 1411 (1994)

[205] See Notice Of Inquiry at para. 65.

efficiently they use their spectrum.[206] We propose to provide direct economic incentives to implement spectrum efficient equipment by imposing spectrum fees that vary according to factors such as bandwidth, area of operation and population. Although the Commission does not currently have statutory authority to impose user fees in these bands,[207] the underlying budgetary assumptions of the Senate Budget Committee's FY 1996 Budget Resolution proposes to grant the FCC expanded authority to impose fees to encourage more "efficient" and "effective" use of the spectrum. Moreover, some members of the user community have recognized that market-based user fees may be appropriate in these band.[208] Manufacturers have also recognized the potential advantages associated with market-based user fees.[209] Accordingly, in this FNPRM we seek additional comment on how such user fees may be implemented into the PLMR bands to provide incentives for more efficient spectrum use and how such fees should be calculated.

137. If Congress grants the FCC fee authority, we propose to impose a fee structure intended to cause users to realize the opportunity cost of their spectrum usage. We believe that such a fee structure would include factors such as bandwidth, area of operation, population coverage and population density. The imposition of such a fee structure would enable users to select the technology best suited to their needs while providing direct financial incentives for efficient spectrum use. A fee structure of this nature imposes a direct economic cost on inefficient spectrum use and forces users to weigh the costs of employing more spectrum efficient equipment against a fee designed to approximate the opportunity cost of the spectrum to other users. This approach is also desirable because it emphasizes technical flexibility rather than strict technical standards.

138. If the Commission receives authority to impose user fees, we believe that such fees should reflect the market value of the spectrum. Therefore, we seek comment on establishing a fee structure based on the market prices of similarly situated spectrum bands.

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[206] The imposition of user fees was addressed in the Refarming Inquiry. See Notice of Inquiry at para 65-69.

[207] 47 U.S.C. §158 currently limits the FCC's fee authority to the imposition of relatively nominal application fees.

[208] See Letter to Alice Rivlin, Director of the Office of Management and Budget, dated February 2, 1995 from the Association of American Railroads, the Land Mobile Communications Council, the American Petroleum Institute and the Industrial Telecommunications Council at P. 3. "The Administration should carefully consider . . . whether additional user fees may be appropriate to ensure that the Federal government receives a fair return for private wireless use of the scarce national spectrum resource."

[209] See *ex parte* letter from Linear Modulation Technology (LMT) dated May 16, 1995 at page 1. "LMT believes that license fees for PLMR systems . . . would allocate the true costs of PLMR service and spectrum usage in an economically-efficient manner."

For example, IVDS and Narrowband PCS auction prices may provide relevant valuations to assist us in determining the appropriate fee to impose in these spectrum bands. Moreover, user fees should also reflect the demographics of the licensed area so that a licensee in a small rural area does not pay the same user fee as a licensee in a major urban center, where demand for spectrum is especially high. Therefore, we also seek comment on whether fees should reflect the population and geographic size of the licensed area. We also seek comment on the relationship between our proposals for exclusivity and user fees. For example, we propose charging a lower fee for shared use than for exclusive use. Higher fees for exclusive use are appropriate because exclusivity enables users to achieve a higher quality of service than shared users. We also seek comment on the appropriateness of a fee per mobile in shared (non-exclusive) bands.

139. We recognize that implementation and enforcement of this type of fee structure may be difficult. For example, licensees may have an incentive to under report population covered, bandwidth, and other operational parameters. Users might also exaggerate efficiencies gained from narrowband technologies or trunking. Accordingly, we seek comment on what mechanisms should be adopted to ensure that such a fee program could be adequately enforced.

140. Finally, we propose that public safety users should be exempt from user fees. Public safety users have traditionally merited special treatment because they are charged with the protection of human life and property.[210] We seek comments regarding this proposal. As an alternative, we seek comments on a reduced or nominal fee structure for public safety users. Such an option would cause these users to recognize the opportunity cost of inefficient spectrum use. Further, this alternative would provide a mechanism for individual public safety entities to examine their need for critical safety related communication resources. Therefore, we seek comment on the merits of a nominal fee versus a no-fee approach with respect to the benefits that each would provide to public safety users and the communities in which they serve. The Commission is committed to ensuring that needs of public safety users are adequately addressed and that such users have access to sufficient, affordable spectrum to perform their critical function.

D. Competitive Bidding

141. Competitive bidding is an alternative mechanism that would lead to efficient use of the PLMR bands below 800 MHz. If we use competitive bidding in these bands, we propose to create geographic overlay licenses and then use competitive bidding as the method to assign these licenses. Our experience in conducting PCS auctions shows that using competitive bidding to assign licenses fosters speedy licensing and promotes economic and

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[210] For example, 6 MHz of spectrum was allocated for public safety use. Gen. Dkt. Nos. 84-1231, 84-1233, and 84-1234, 2 FCC Rcd 1825 (1986).

market-based business decisions over protracted government regulation. It also promotes efficient spectrum use by allowing the marketplace to determine the value of licenses and by awarding licenses to those who value them most highly. Competitive bidding further promotes market-based decision making, by allowing bidders to obtain the aggregation of licenses which best suit their business needs, without the need to acquire licenses in inefficient secondary market transactions. Thus, auctions eliminate unnecessary transaction costs in acquiring spectrum to implement advanced communications services. Finally, competitive bidding can raise substantial new revenues for the U.S. Treasury, ensuring that the public receives compensation for the use of the valuable spectrum resource.

142. The Commission's ability to introduce auctions for PLMR licenses is complicated by the current shared use environment and by the large number of incumbents licensed on some channels in some areas. Mandatory relocation of incumbents may not be feasible in these bands because of the lack of alternative channels for relocation. Accordingly, if auctions are used to award licenses in the PLMR bands, we propose to create overlay licenses on a geographic basis then auction these licenses. Such overlay licenses would contain certain rights and responsibilities relating to the incumbent users. For example, the overlay licensee would be required to provide co-channel protection and adjacent channel interference protection for incumbent users. While incumbents would be entitled to full co-channel interference protection for their existing facilities, they would not be allowed to expand beyond their existing service area unless they obtained the overlay license, or negotiated with the overlay licensee. The overlay licensee would be able to cap the number of users allowed on its channel within its geographic area and could negotiate voluntary mergers, buyouts, frequency swaps, or similar arrangements with incumbents.

143. The objective of this proposal is to introduce market forces into the PLMR bands through the overlay license, while allowing incumbents to continue existing operations without harmful interference. A similar proposal was made with respect to 900 MHz SMR systems in the Second Report and Order and Further Notice of Proposed Rule Making, in PR Docket No. 89-553, PP Docket No. 93-253 (released April 17, 1995). We believe that this overlay license will increase efficiency because of the economic incentives to promote spectrum efficiency. The overlay licensee will incur an opportunity cost if spectrum is not used as efficiently as possible and will therefore have incentives to encourage maximum efficiency by incumbent users. We seek comment on this proposal. Specifically, we ask commenters to indicate what geographic areas should be created for the overlay licenses. We also seek comment on what interference standards should be adopted for incumbent users. Commenters should also address how we should define "existing facilities" for which incumbents would be entitled to interference protection. What types of modifications and expansions, if any, should incumbents be permitted to make? Commenters should also address what type of auction method should be used for these bands and whether any eligibility restrictions are appropriate. We tentatively conclude that such auctions should be open to all potential bidders in order to ensure that the overlay licenses will be awarded to the parties that value them the most highly and to promote more flexible use of the spectrum.

144. An alternative to our auction of overlay licenses is to hold in reserve any channels that are created as users migrate to narrower channel widths. We would then aggregate these channels in appropriate geographic areas and offer them for auction. We seek comment on the feasibility of this proposal, whether sufficient channels will be available in a reasonable time frame to conduct an auction, and whether geographic aggregation is realistic.

145. Except for licensees who choose to be private carriers,[211] the PLMR bands are occupied by licensees that do not provide subscriber-based services. Thus, pursuant to our current statutory authority, competitive bidding for these licenses is precluded. In implementing our statutory authority, we concluded that "where mutual exclusivity between applications cannot exist because channels must be shared by multiple licensees" auctions are precluded.[212] In addition, we have also determined that our existing statutory authority excludes from competitive bidding "those services or classes of services in which licensees do not receive compensation from subscribers, and, hence, are outside the scope of Section 309(j)(2)(A) [47 U.S.C. § 309(j)(2)(A)]."[213] Although the Commission does not currently have statutory authority to auction spectrum for PLMR licenses, the underlying budgetary assumptions of the Senate Budget Committee's FY 1996 Budget Resolution propose expanding the Commission's auction authority to include additional spectrum.[214] The Administration has also proposed expanded auction authority.[215]

146. We tentatively conclude that public safety users should be exempt from competitive bidding for overlay licenses, or another type of competitive bidding mechanism, if adopted. Public safety users have traditionally argued for special treatment because they are charged with protecting human life and property.[216] We seek comment on whether channels should be set aside for exclusive public safety use and therefore not be available for

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[211] See 47 C.F.R. § 90.179(a).

[212] In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Second Report and Order, PP Docket No. 93-253, 9 FCC Rcd 2348 at para. 13 (1994).

[213] Second Report and Order, PP Docket No. 93-253, 9 FCC Rcd 2348, at para. 23 (1994).

[214] Senate Committee on Budget, Concurrent Resolution on Budget for FY 1996 to accompany S. Con. Res. 13, S. Rep. No. 104-82, 104th Cong., 1st Sess. 199-200 (1995).

[215] See United States Office of Management and Budget, Budget of United States Government, Fiscal Year 1996, pages 255-256.

[216] For example, 6 MHz of spectrum was allocated for public safety use. Gen. Dkt. Nos. 84-1231, 84-1233, and 84-1234, 2 FCC Rcd 1825 (1986).

auction. We also seek alternative proposals on the best mechanism to ensure that public safety users maintain access to spectrum that is critical to the performance of their public service responsibilities.

147. Finally, we seek comment on the types of services winning bidders should be permitted to offer. We propose to amend the allocation rules for these bands to allow winning bidders to use the spectrum to provide either private services, commercial services or some combination of the two. However, we seek comment on whether some limitations should be placed on the permissible use of this spectrum. Commenters are encouraged to identify which PLMR bands, if any, should be excluded from competitive bidding.

E. New Channels

148. Finally, the Commission seeks comment on how to treat new channels created as a result of users converting from 25 kHz channels to 12.5 kHz or 6.25 kHz channels. This issue will arise only in the absence of competitive bidding for overlay licenses. Spectrum that may be "cleared" as the conversion to narrowband technologies occurs is likely to be in small, non-contiguous blocks located geographically between groups of existing licensees. We seek comment on how we can create channels from "cleared" spectrum in a particular geographic area. Additionally, we seek comment on how to allocate and assign such channels. We seek comment on various alternatives, including: freezing licensing on such channels until they can be auctioned, allocating some or all of the "new" channels to public safety users, or dividing such channels between the consolidated radio services for assignment to new users.

VI. PROCEDURAL MATTERS

149. Ordering Clause. **IT IS ORDERED** that Part 90 of the Commission's Rules and Regulations **IS AMENDED** as specified in Appendix F, effective 30 days after publication in the Federal Register. Authority for issuance of this Report and Order and Further Notice of Proposed Rule Making is contained in Sections 4(i), 302, 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 302, 303(g), 303(r), and 332(a).

150. Ex Parte Rules Non-Restricted Proceeding. This is a non-restricted notice and comment rule making proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission rules. See generally 47 C.F.R. §§ 1.202, 1.1203, and 1.1206(a).

151. Regulatory Flexibility Analysis. The analysis required by the Regulatory Flexibility Act of 1980, 5 U.S.C. § 608 is set forth in Appendices D and E attached.

152. Comment Dates. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **September 15, 1995** and reply comments on or before **October 16, 1995**. To file formally in this proceeding you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

153. Contact Person. For further information regarding this proceeding, contact Ira Keltz or Mark Rubin at 202-418-0680.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

LIST OF FIGURES

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FIGURE 1 - PRIVATE LAND MOBILE RADIO SERVICES

DESCRIPTION OF PRIVATE LAND MOBILE RADIO SERVICES BELOW 470 MHz	NUMBER OF TRANSMITTERS[1]	NUMBER OF CHANNELS		FREQUENCY COORD.[10]
		VHF[2]	UHF[3]	
BUSINESS: educational, religious, hospital, small business, etc. .	3,575,223	109[4]	289	NABER(PCIA)
POLICE: protection of citizens in emergency and non-emergency situations	1,550,394	75	86	APCO
LOCAL GOVERNMENT: official functions of governmental activities	1,382,647	80	78	APCO
SPECIAL INDUSTRIAL: heavy construction (roads/bridges), farming, and mining	843,747	81[5]	30	ITA
FIRE: fire protection services by state and local entities	826,773	38	48	IMSA
POWER: electricity, natural or manufactured gas, water and steam	768,551	77	40	UTC
RAILROAD: rail transport of passengers and freight	742,454	119	20	AAR
SPECIAL EMERGENCY:[6] protection of life and property for emergency medical care	419,436	19[7]	74[8]	IMSA/IAFC NABER(PCIA)
FORESTRY CONSERVATION: protection and conservation of forests and wildlife	356,607	58	38	AASHTO
PETROLEUM: production, collection, and refining petroleum products by pipeline	340,913	103	36	PFCC of API
HIGHWAY MAINTENANCE: construction and maintenance of highway activities	335,109	43	38	AASHTO
MANUFACTURERS: plants, factories, mills, and shipyards	308,227	52	48	MRFAC
MOTOR CARRIER: trucking (short and long haul) and public buses	182,598	56	30	ATA
TELEPHONE MAINTENANCE: daily repair and emergency restoration	137,640	10	36	TELFAC
TAXI CABS: nonscheduled passenger land transportation	123,864	36	24	ITLA
FOREST PRODUCTS: logging, hauling, and manufacturing of lumber products	119,428	106	50	FIT
AUTOMOBILE EMERGENCY: dispatching of repair trucks, tow trucks, etc.	35,877	23	4	AAA
RELAY PRESS: publication and operation of newspaper and press	22,017	12	4	ANPA
VIDEO PRODUCTION: producing, videotaping, filming of movies and television programs	12,794	18	0	AMPTP
TOTALS: 20 Radio Services (includes EMRS)[6]	12,084,299	553[9]	324[9]	

NOTES

1. Station count represents the total transmitters (including mobiles) licensed as of December 1994.

2. VHF denotes channels assigned in the 150 - 174 MHz band, including the 169 - 174 MHz channels available on a secondary basis to the Federal Government.

3. UHF denotes channels assigned in the 450 - 470 MHz band.

4. The number includes the 44 channels used only in Puerto Rico and the US Virgin Islands.

5. The number includes the 14 channels used only in Puerto Rico and the US Virgin Islands.

6. The Special Emergency channel count includes channels designated to the EMRS service. A recent rulemaking directed that channels previously allocated to the Special Emergency Radio Service be reallocated to the EMRS service. EMRS channels are used for time critical protection of life and property and emergency medical care while Special Emergency is used for administrative communications regarding safety.

7. The number includes 11 channels designated for Special Emergency, 7 channels designated for EMRS, and 8 channels shared between the two.

8. The number includes 70 channels designated for EMRS, and 4 channels shared between the two.

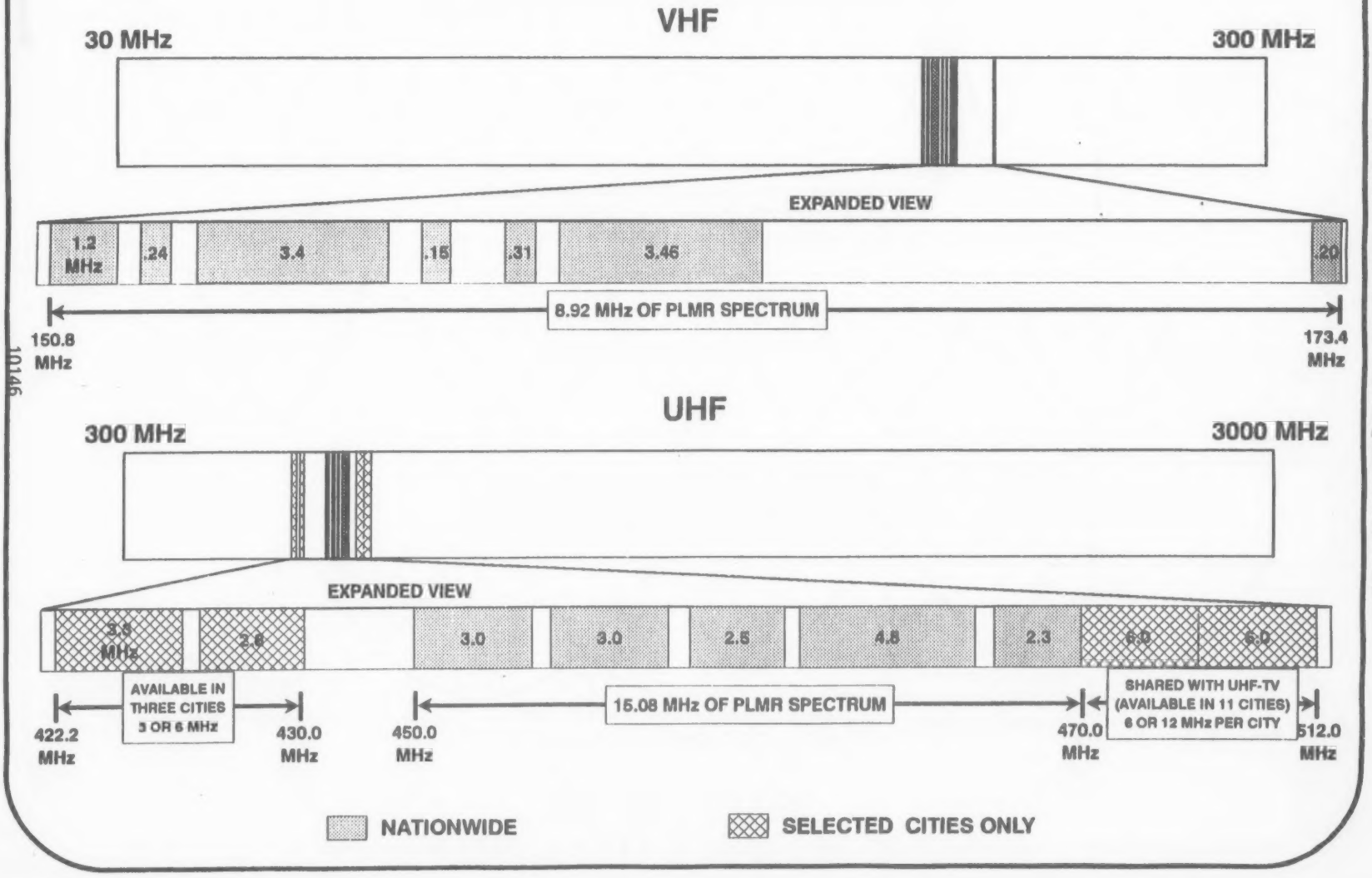
9. Total channel count does not equal sum of the column because many channels are shared between services.

10. Frequency coordinator acronyms:

AAA	American Automobile Association
AASHTO	American Association of State Highway and Transportation Officials
AAR	Association of American Railroads
AMPTP	Alliance of Motion Picture and Television Producers
ANPA	American Newspaper Publishers Association
APCO	Association of Public Safety Communications Officials - International, Inc.
API	American Petroleum Institute
FIT	Forest Industries Telecommunications
IAFC	International Association of Fire Chiefs
IMSA	International Municipal Signal Association
ITA	Industrial Telecommunications Association, Inc.
ITLA	International Taxicab and Livery Association
MRFAC	Manufacturers Radio Frequency Advisory Committee
NABER	National Association of Business and Educational Radio (merged with PCIA)
PCIA	Personal Communications Industry Association
PFCC	Petroleum Frequency Coordinating Committee
TELFAC	Telephone Maintenance Frequency Advisory Committee
UTC	Utilities Telecommunications Committee

REFARMING FREQUENCY BANDS

24 MHz OF SPECTRUM NATIONWIDE
ADDITIONAL 3 TO 12 MHz IN SOME CITIES



10146

FIGURE 2 - REFARMING FREQUENCY BANDS

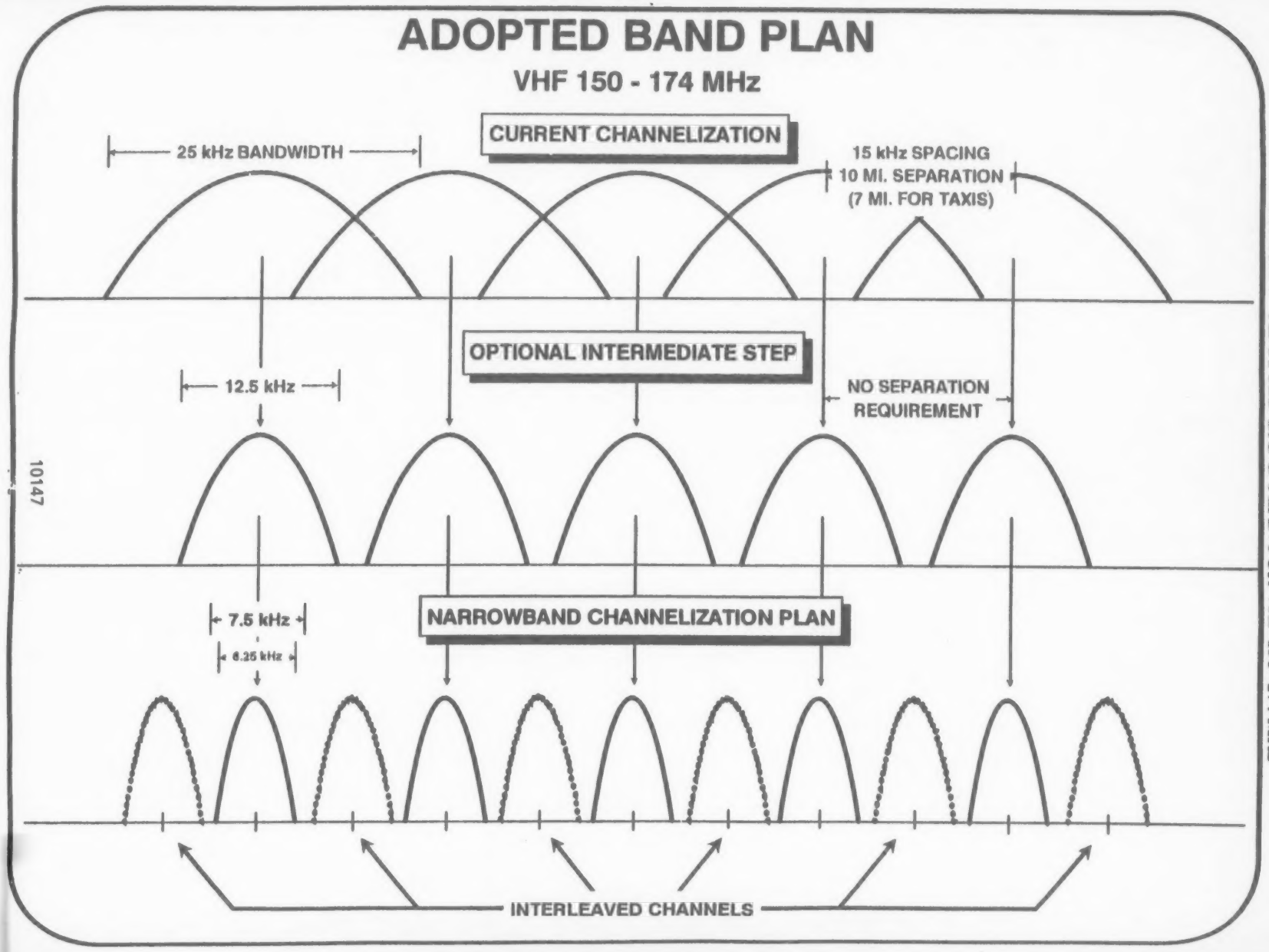


FIGURE 3 - ADOPTED BAND PLAN FOR VHF 150 - 174 MHz

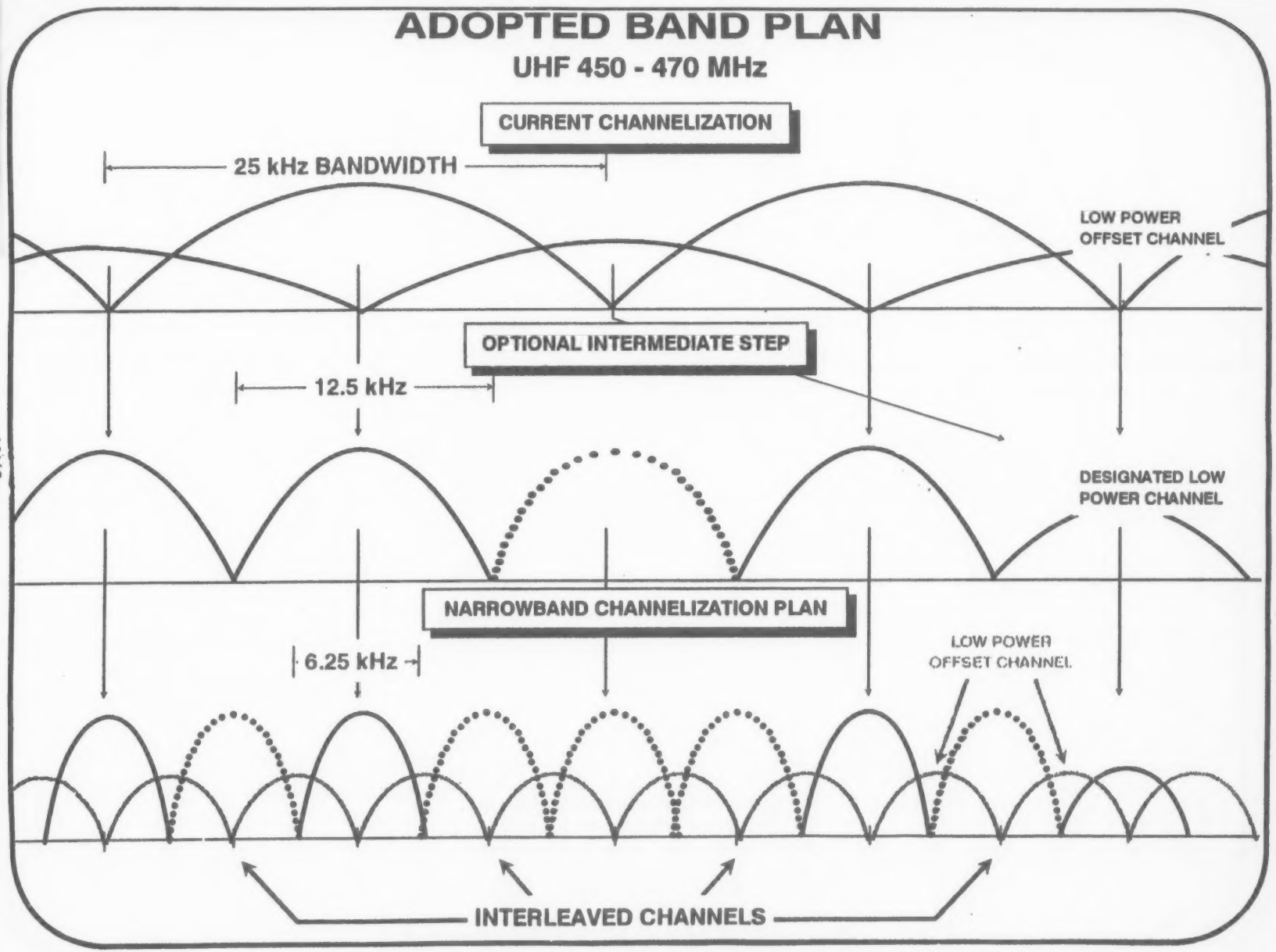


FIGURE 4 - ADOPTED BAND PLAN FOR UHF 450 - 470 MHz

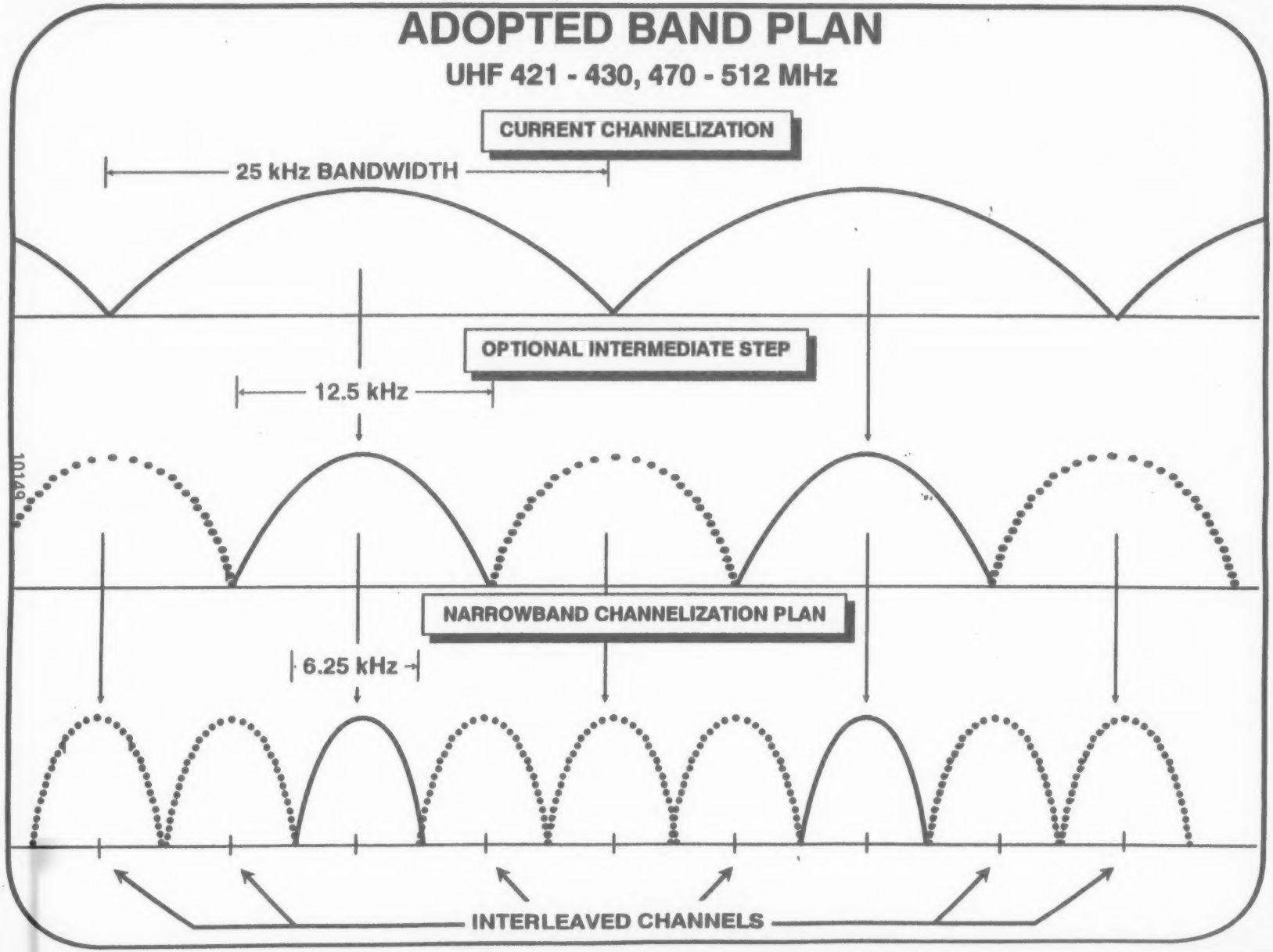


FIGURE 5 - ADOPTED BAND PLAN FOR UHF 421 -430 MHz, 470 - 512 MHz

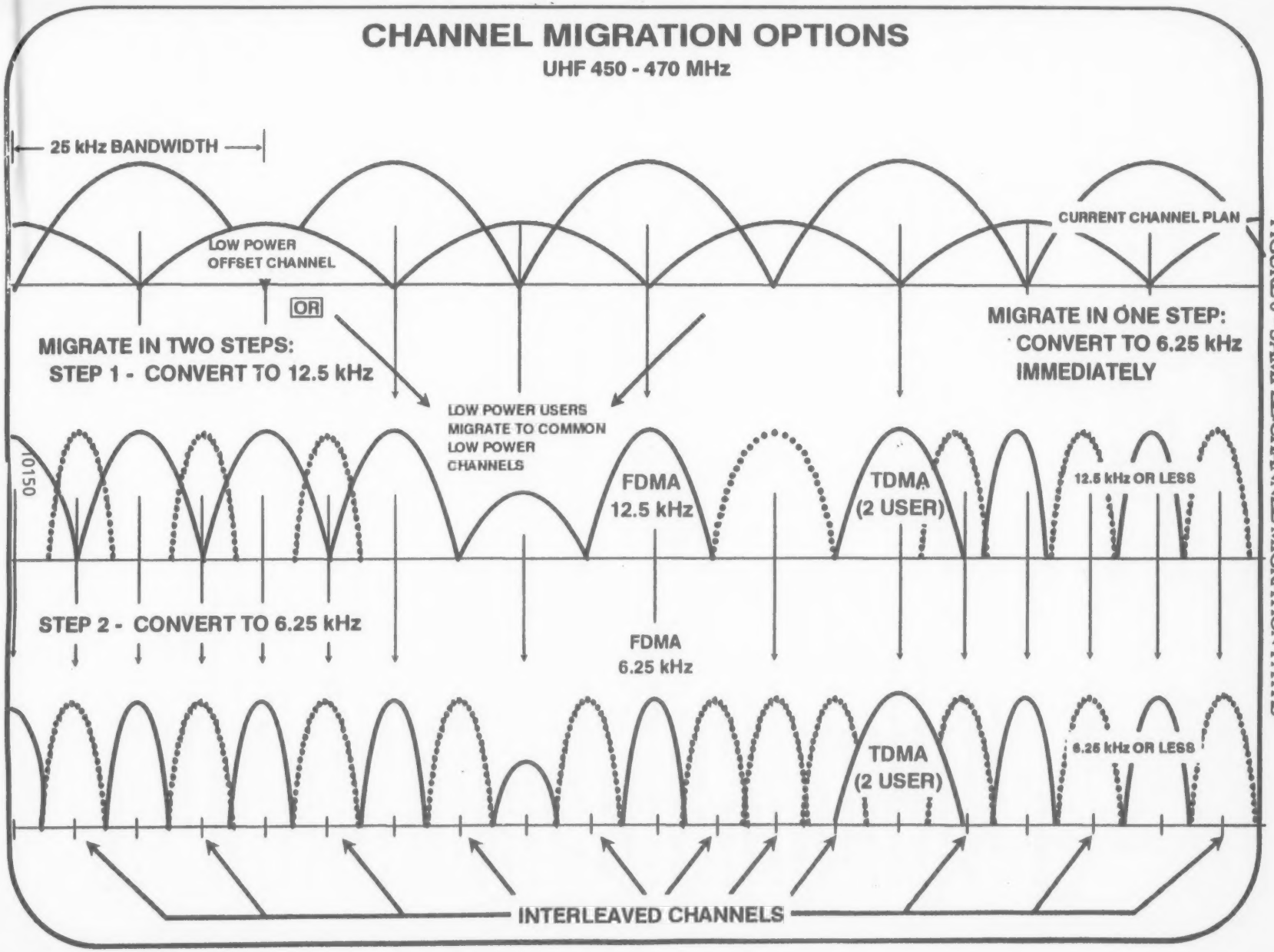


FIGURE 6 - SAMPLE CHANNEL MIGRATION PATHS

APPENDIX B

LIST OF COMMENTERS

Comments

1033 Emergency Team of Nowata, OK
8th Police District Town
A & M Electronics Video & Communications System, Inc.
A-Sonic Guard, Incorporated
Academy Of Model Aeronautics
Academy Of Model et. al.
Ada County Sheriff's Office
Adams County Communications Center, Inc.
Adams Vounteer Fire Department
Advanced Communications & Electronics, Inc.
Advanced Mobilecomm, Inc.
Aeronautical Radio, Inc.
Airbourne Express/Airbourne Freight Corporation
Alabama Association, Public Safety Communication Officers
Alarm Industry Communications Committee
Alberta Roberts
Allan Worrest
Alpine Mother Lode, San Joaquin Emergency Medical Services Agency
Amelia Radosevich
American Association State Highway and Transportation Officials
American Automobile Association, Inc.
American Meter Company
American Mobile Radio Association
American Petroleum Institute
American Power Boat Assoc.
American Telemetry Equipment, Inc.
American Trucking Associations, Inc.
Amoco Production Company
Andrews Radio Service
Arizona Chapter Associated Public Safety Communications Officers, Inc.
Arizona Department Of Corrections
Arizona Department Of Public Safety
Arizona Game & Fish Department
Arkansas Department of Health
Artesia Fire Protection District
Ashland Police Department
Ashville Fire Department

Association for Maximum Service Television, Inc.
Associated Public-Safety Communications Officers
Association For Maximum Service Television, Inc.
Association Of American Railroads
Association South Central Oklahoma Governments
Astoria Fire Department
Astoria Police Department
Azalea Rural Fire District
Azcom Paging, Inc.
Bandera County Constable (Pct. 2)
BARCOM Incorporated
Barnsdall Community Ambulance Association, Inc.
Barnsdall Police Department
Barnsdall Volunteer Fire Department
Bartlesville Fire Department
Bartlesville Police Department
Bartlesville Police Reserve
Bay Alarm Company
Bay City Fire Department
Bell Atlantic Personal Communications, Inc.
Bell County, Texas
Bellsouth Corporation
Beltronics, Inc.
Bemus Point Volunteer Fire Company, Inc.
Bendix/King Radio Corporation
Benton County Oregon
Birch Construction
Black Gold Well Service, Inc.
Blooston, Mordkofsky, Jackson & Dickens
Bluestem Girl Scott Council
Bomar Crystal Company
Bosshard Radio Service
Bostonia Fire Protection District
Boulder Regional Communications Center
Branch Country Board of Road Commissioners
Brentwood Police Department
Broward County Human Services Department
Brown And Schwaninger
Bryant, Kristi
Buckeye Power, Inc.
Business Communications
Butler Township Fire Department
Busti Highway Superintendent
C-Comm Corporation

C.A.R.T.S. Transportation
Cabarrus County Fire Chiefs Association
Cabarrus County, North Carolina
Cagle Communications, Inc.
California Department Of Transportation Office of Communications
California Department Of Corrections
California Emergency Medical Association
California Peace Officers Assoc.
California Public-Safety Radio Associations, Inc.
California State Automobile Association
California State University, Stanislaus
Campbell County Firefighters Educational Association
Canadian Couunty Commissioners
Canadian Volunteer Fire Department
Caney Fire Department
Cannon Beach Rfpd
Capital Cities/ABC, Inc.
Cardinal, Ralph
Carroll Highway Department
Cascade Telephone Communications
City of Casper Public Safety
Cattaraugus County Communications Coordinator
Cattaraugus Fire Company, Inc.
Ce-Bar Volunteer Fire Department
Cedar Lake Volunteer Fire Department
Celpage, Inc
Cen-Tex Electronics
Central Data Processing Authority
Central Lane Communication Center
Central Oregon Fire Fire Chief's Association
Central School District 13J
Central Station Security Systems
Central Wyoming College
Centralina Council Of Governments
Chamness Radio Commications
Chautaugua County Councilman
Chautauqua County Department of Public Works
Chautauqua County Emergency
Choctaw County Commissioners
City Of Amarillo
City Of Antioch, California Police Department
City Of Astoria Fire Department
City Of Atlanta Fire Department
City Of Bakersfield Public Works Department

City Of Baldwin Park Police Department
City Of Beaverton Washington County, Oregon
City Of Benicia Police Department
City Of Brentwood
City Of Canyonville Police Department
City Of Carlsbad Office of Chief of Police
City Of Casper
City Of Ceres Department
City Of Chula Vista Police Department
City Of Cincinnati Department of Safety
City Of Claremont Police Department
City Of Colorado Springs
City Of Cornelius
City Of Coronado Police
City Of Dallas, TX
City Of El Cerrito
City Of Gladstone
City Of Glendale
City Of Gold Beach
City Of Grants Pass
City Of Green River
City Of Hamilton
City Of Hillsboro
City Of Houston Texas
City Of Houston Texas
City Of Kansas City Water
City Of Kennewick
City Of Klamath Falls
City Of Lewiston
City Of Longmont
City Of Madison
City Of Martinez
City Of Mesa
City Of Modesto Fire Depa
City Of Myrtle Creek
City Of Newton Ambulance
City Of Oregon City
City Of Phoenix
City Of Phoenix Fire Depaartment
City Of Pinole Police Department
City Of Plainview, TX
City Of Pleasant Hill
City Of Port Angeles
City Of Prineville

City Of Rocky Mount
City Of Roseburg
City Of Sacramento
City Of Salamanca
City Of Salisbury
City Of San Diego
City Of San Jose
City Of San Ramon
City Of Sheridan
City Of Springfield, Oregon
City Of Stinnett
City Of The Dalles
City Of Tigard, Oregon
City Of Topeka
City Of Torrance
City Of Tucson
City Of Victorville
City Of Visalia
City Of Walnut Creek
City Of Warrenton
City Of Weiser, Idaho
City Of West Richland
City Of Yonkers Police
City Port Orford
Clallam County Public Works Department
Clark County Engineer
Clark County Health District
Clatsop County Firefighters
Claudia Rodger
Cleveland County
Cloverdale Rural Fire Protection District
Clymer Volunteer Fire Dept.
Coalition Of Industrial and Land Transportation Land Mobile Radio Users
Coaltrain Corporation
Coastal Corporation
Coeur D'alene Aeromodelin
Cokeville Volunteer
Colorado Council Of React
Colorado Division Of Telecommunications
Colorado House of Representatives
Columbia County Emergency Communications Dist.
Columbia County Office of Emergency Services
Communications Maintenance, Inc.
Communitech, Inc.

Community Systems Company
Compton Unified School District
Concord Police Department
Consolidated Rail Corporation
Contra Costa County Health Department
Coos County Sheriff's Office
Corvallis Fire Department
Cotton County Board
County Of Coos Board
County Of Kern Information
County Of Lexington
County Of Lincoln
County Of Los Angeles
County Of Orange, CA
Crawford County
Crook County
Crook County Fire Department
Crook County Sheriff Office
Crossroad Trucking
Crowheart Volunteer Fire Department
Crown Point Community
Curry County Oregon
Custom Climate Control
Cycomm Corporation
Dalhart Police Dept.
David Beck
Davie County Emergency
Davis County Highway
Days Creek Rural Fire
Dee Dee Dickinson
Delano Police Dept.
Department Of Youth Authority
Deschutes County Sheriff
Detroit Department Of Police
Dewey Fire Dept.
Dewey Police Dept.
Diamond Hook Ranch
Don R. Fisher
Donald R. Brinka
Douglas County Board
Douglas County Emergency
Douglas County Fire
Douglas County Sheriff's
Du-Comm

Dunkirk Dept. Of Police
Dutchess County Bureau
Dynamic Automotive
E.F. Johnson Company
Eagle Communications
Eagle Point Schools
Eagle Rock Farm
EARMARK
East Fishkill Fire District
East Randolph Fire Company
East Side Radio & Communications Co.
East Town Of Dunkirk
Economy Well Service
Edison Volunteer Fire Dept.
Edward R. Cenkner
El Cerrito Police Depart
El Paso County Vol. Fire Dept.
Elbert County Board of Commissioners
Elizabeth Vol. Fire Department
Elkins Group Internationa
Elkton Rural Fire District
Ellicott Vol. Fire Dept.
Ellingford Bros., Inc.
Emergency Dispatch Center
Emmet County Engineer
Emory University
Empire Fire District
Encinitas Fire Protection
Engineering Associates
Enron Oil & Gas Co.
Ericsson GE Mobile Communications, Inc.
Evanston Police Dept.
Evanston Regional Hospital
Everett S. Rice
F.H. Stoltze Land
Fagen-Miller, Inc.
Falcon Fire Protection
Falcon Property Owners
Falcon Volunteer Fire Department
Fennemore Craig
Findley Lake Volunteer Firemen's Assoc., Inc.
Firis Communications
Florida Department Of Agriculture
Florida Dept. Of Management Services (Div. of Communications)

Florida Dept. Of Transportation
Florida Forestry Association
Forestry-Conservation
Frank P. Vetsch
Fred Roberts
Fremont County Agent
Fremont County Ambulance
Fremont County Board
Fremont County Communications
Fremont County Coroner
Fremont County E.M.S.
Fremont County Emergency
Fremont County Firefighters
Fremont County Hazardous
Fremont County Road
Fremont County School
Fremont County Search
Fremont County Sheriff's
Fremont County Vehicle
Ft. Washakie Fire
Fujitsu Ten Corp.
G. T. Ankrum
G.A. Henry Radio Electron
Gary C. Jensen
Gaston Rural Fire District
Gatlin Plumbing & Heating
Gec-Marconi Communications
General Paving Co.
George A. Wilson
Georgia Bureau Of Invest
Georgia Department Of Administration
Georgia Emergency
Gerald Mitsch
Gila County Community
Giustina Land & Timber
Glendale Rural Fire District
Goddard Trucking
Goodwill Hose Co.
Gospel Mission
Governor Of Iowa
Gowanda Fire Chief
Grady County Commissioner
Grand Traverse County
Grant County Emergency Management

Grant E. Smith
Grassfield RC Club
Greater Philadelphia
Green River Fire Department
Green River Police Department
Gregory M. Stone & Association
Gte Service Corportion
H. Mizrahi
Hall County Central
Hamilton County Association
Hammond Furnace & Supply
Hanover Volunteer Fire
Harper County Community
Harris County Data Service
Harvey County Communication
Harvey J. Humphrey
Heartland Communications
Henderson Electric
Henry G. Schuett, Jr.
Hermosa Cliff Fire Department
Hewlett-Packard Company
Hill Communications
Hitec Radio Control
Hluska Enterprises
Homestake Mining
Hot Springs County
Houston Fire Depaartment
Hughes County Commissioners
Hughson Fire Protection
Idaho Dept. Of Lands
Idaho State Police Division
Idaho State Senate
IHC Evanston Regional Hospital, Evanston, NY
Illinois Association Of Chiefs of Police
Illinois Valley Fire Department
Independence Police Department
Indian River County
Industrial Telecommunication Association
Inland Steel Company
Intermountain Electric
International Association
International Bridge, Tunnel
International Municipal
Ketchum Police Department

Kiantone Independent
King County Fire Department
Kinnear Ambulance
Klamath County 911
Klickitat County
Knappa-Svensen-Burnside
Kristi Bryant
Lake County Radio Department
Lakeview Fire Department.
Lambda Communications
Lander Rural Fire
Lander Vol. Fire Department
Lane County Public Works
Law Enforcement Administrators Telecommunications Advisory Committee (IA)
Lawrence County Highway
Lawton-Comanche County
Lazy Vd Land & Livestock Co.
Lenexa Police Dept.
Lewistown Rural Fire
Licom Communications
Likini Cab Company, Inc.
Lincoln County Civil
Linn County Fire Defense
Linn County Kansas
Llewellyn Wing
Long Lake Fire Department
Los Angeles County Transportation Communications Cooperative
Lou Ann Rowen
Lowell Police Dept.
Lubbock Radio Paging
Macedon Fire Department
Magic Concrete Company
Malin Volunteer Fire Department
Manhattan Beach Police Department
Marc Dickinson
Maricopa County Department
Maricopa County React
Maricopa County Sheriff
Marion County
Mariposa County
Marshall Communications
Metro. Atlanta Rapid Transit Authority
Martin L. Smith
Mason County Fire Protection

Mass Transit Administration (Baltimore, MD)
Massachusetts Bay Transportation Authority
Mayville Fire Department
MCI Telecommunications
MedTrans
Mercy Flights, Inc.
Metro-North Commuter
Michael G. Redman
Michigan State University
Midstate Electric
Mike Siler
Mike Stuart
Mills Volunteer Fire
Milo Volunteer Fire
Minooka Fire Department
Mission Township Fire
Mist-Birkenfeld Rural
Mitchell Energy & Development
Mobile Radio Resources
Montana Chapter, APCO
Montana Power Company
Moon Island Farms
Moon Security Services
Morrow County
Morton Kinnear Fire
Moscow Police Department
Motorola, Inc.
Mountain Rescue Assoc.
Murphy Exploration
Myers Forklift, Inc.
Myrtle Creek Fire
National Association of Broadcasters
NABER
National Assoc. State Emergency Medical Services Directors
National Association of State Foresters
National Coal Association
National Security Service
National Solid Wastes Management Association
Nebraska Forest Service
Network USA
New Hackensak Fire Department
New Jersey State Police Department
New York City Fire Department
New York State Police Department

Newportville Fire Company
Nicollet County
Nippon Telegraph & Telephone
New Jersey Transit Rail
Noble County, OK
North Carolina Division
North Central Elbert County Volunteer Fire Dept., Inc.
North Dakota State Radio Communications
Northern Indiana Commuter Transportation District
Northern Lake County
Nowata County Sheriff
Nowata Fire Department
Nowata Police Department
Nucop, Inc
Oakland Rural Fire
Oceanside Police Department
Ochelata Vol. Fire Department
Offshore Navigation, Inc.
Oglesby Fire Department
Oglesby Vol. Fire Department
Oregon City Public School
Oregon Department Of State Police
Oregon Dept. Of Agriculture
Oregon Dept. Of Human Services
Oregon Emergency Management
Osage Hills Rural Fire Department
Ositis Communications
Ottawa County Engineer
Otter Tail County
Otto Fire Department
Pacificorp
Pactel Paging
Page Communications
Page Hawaii, Inc.
Paging Network, Inc.
Park County Fire
Pauline Dickinson
Pavillion Volunteer Fire
Pennsylvania Turnpike
Peoria County
Peter E. Olsen
Peyton Fire Department
Phelps Dodge Corporpation
Phelps Dodge Mining

Phelps Dodge Morenci
Philomath Fire Dept.
Pikes Peak Fire Fighters
Pittsburg County
Platte Valley Communications
Poland Town Clerk's Office
Polk County
Pope County Highway
Powerspectrum, Inc.
Premier Construction Co.
Prince George's County
Public Safety Communications Council
R & D Communications
Radio Control Manufacture
Radio Shop, Inc.
Rainbow Water District
Ralph Keppel
Ramona Fire Dept.
Randolph Fire Co.
Ray's Electronics Inc.
Redmond Fire Dept.
Regional Fire Protection Authority (CA)
Security, Inc.
Richard Styffe
Richard Tokarz
Richland County
Richland Fire & Emergency
Ritron, Inc.
Riverton Fire
Riverton Valley E.M.T.
Robert Arneson
Robert F. Aberle
Rock Springs Police
Rock Springs Sweetwater
Rodeo-Hercules Fire
Ron Uyeyama
Routt County Communications
Rupp Rental & Sales
Rural Fire Protection
Sager, Pavlick
Saint Louis County
Salamanca Volunteer Fire Department
San Diego County
San Diego County Sheriff

San Francisco Deptartment
Sandusky County Engineer
Saratoga Volunteer Fire Department
Scappoose City Police Department
Scott M. (illegible signature)
SEA, Inc.
Seaberg Communications
Seaside Volunteer Fire
Securicor Pmr Systems Ltd
Security Alarm Company
Security Couriers
Security Fire Department
Security Fire Protection
Sedona Fire Dept.
Senses International, Inc
Seward County Highway
Shasta Area Safety Commu
Shawnee Mission Medical
Shelby County 911
Shiver Security
Shoshone County, Idaho
Signal Communications
Sixes Rural Fire Protect
Soldier Township
Sonoma County, California
Sound Systems, Inc.
South County Agriculture
South Dakota Department of Agriculture/Division of Forestry
Southern Security Guard Service, Inc.
Southern California Edison Company
Southern California Gas
Southern California Rapid Transit District
Southern Oregon Regional Communications
Southwest Bell County Volunteer Fire Dept.
Southwestern Bell
Spacelabs Medical, Inc.
Spectrum Resources
Spokane County Fire District
Sports Flyers Association
St. Clair County
St. Helens Rural Fire
Staatsburgh Fire District
Stan's Towing
Stanislaus County Fire Chiefs' Assoc.

Stanley Hose Co. No. 1
Star Valley Hospital
State Of Alaska Division of Information Service Telecommunications Section
State Of California
State Of Colorado Div. of Telecomm.
State Of Illinois
State Of Iowa Dept.
State Of Minnesota
State Of Montana
State Of Nebraska
State Of South Carolina
State Of Vermont
State Of Wyoming
State Rep. Zickus
Stayton Fire District
Stephens County
Sti Mobile Communications
Stockton Volunteer Fire Company
Suffa And Cavell, Inc.
Suffolk County Policy Department
Sun Valley Aviation
Superior Petroleum
Sweetwater County Board
Sweetwater County Emergency
Sweetwater County Fire Department
Sweetwater County School
Symplex Communications
T. Wright Dickinson
Tannehill Scipio Lake
Technical Service Association
Techxotic
Tektronix, Inc.
Telecommunications Industry Association
Teton Communications
Texas Department Of Public
Texas Department Of Transportation
Texas Department Of Health
Texas Security Central
The Radio Shop
The Service Specialist
Thomas L. Ratcliff
Thomas Vandermolen
Thunder Basin Coal Company
Thurston County Department of Communications

Tight Ten Off Road
Tillamook County Board Of
Tillamook County Sheriff
Tillamook Water
Tiller Rural Fire
Tom Prescott
Town Of Avon Fire
Town Of Bosti
Town Of Brookline
Town Of Carroll
Town Of Carroll Highway
Town Of Chautauqua
Town Of Clymer
Town Of Copan Fire
Town Of Ellicott Police
Town Of Long Lake
Town Of Lyons Ambulance
Town Of Macedon
Town Of Poland Highway
Town Of Ripley Highway
Town Of Sheridan Highway
Town Of Sherman
Town Of Sherman Highway
Town Of Westfield
Tri-Com Communication
Tri-Lakes Fire Protection
Tuscaloosa County
Two-Way Communications, Inc.
Uinta County Commission
Uinta County School
Uniden America Corp.
Unified Sewerage Agency
Union Pacific Railroad
Unita County, Wyoming
Valley Burglar & Fire Alarm Co., Inc.
Valley County Sheriffs Office
Valley Two-Way, Inc.
Valley Water Service
Van Buren County Road
Vanguard Communication
Vera Community Fire Dept.
Village Of Celoron
Village Of East Randolph
Village Of Falconer

Village Of Falconer
Village Of Mayville, Ny
Village Of Silver Creek
Village Of Westfield
Virginia Dept. Of Health
W. A. Hendrickson Co.
Wallace Communication
Wallowa County Sheriff
Wallowa Memorial Hospital
Walnut Knob Farms
Walter A. Neaves, P.E.
Walter D. Moore
Warren County (NJ)
Washakie County Sheriff
Washington County
Washington County Board of Commissioners
Washington County Consol
Washington County Sheriff's Dept.
Washington County Vol. Fire Dept.
Washington State Parks and Recreation Commission
Washington State Department Of Natural Resources
Washington State Patrol
Watchung Volunteer Fire Dept.
Wayne County Board of Supervisors
Wayne County Fire Advisory Bd.
Wayne Reser
Webster County Attorney
Wes Jenkins Builders
Western Management Corp.
Western Telecommunication
Westfield Fire Department
Weyerhaeuser Company
Wheatland Emergency
Wilburton-Latimer County
Willamette Valley
William T. Zuck Et Al.
Williamson Volunteer Ambulance
Wilson Iron Works
Winchuck Rural Fire Protection Dist.
Winston-Dillard Fire Protection Dist.
Wirth Company
Wissinoming Civic Association
Wolcott Volunteer Fire
Woodburn Ambulance

World Enterprise
Wright Dickinson
Wyoming County Sheriff
Wyoming Department Of Health
Wyoming Dept. Of Transportation
Wyoming Emergency Management Agency
Wyoming State Engineer's Office
Wyoming Telecommunication
Yamhill Communications
Yellow Cab Service
Yoncalla Rural Fire District

Reply Comments

911 Communications Control of Onondaga County, Syracuse, NY
Academy Of Model Aeronautics
Advanced Mobilecomm
Aeronautical Radio
Alarm Industry Communication
American Assoc. Of State
American Automobile Association
American Petroleum Institute
Aritech Corp.
Associated Public-Safety
Association Of American Railroads
California Dept. Of General Services, Telecommunications Division
California Public-Safety
City Of Greeley Police
City Of Los Angeles
County Of Los Angeles
County Of Orange, CA
Cycomm Corporation
Dr. Gregory M. Stone
Ericsson GE Mobile
Forest Industries Telecom
Forestry-Conservation Communications Assoc.
GTE Service Corp.
Hewlett-Packard Company
Illinois Department
Industrial Telecommunications Association, Inc.
International Municipal Signal Association
International Taxicab & Livery Association
IVHS America
Ketchum Fire Department
Land Mobile Communication
Metropolitan Water District
Montana Power Company
Land Mobile Communications Council
Metropolitan Water District
Montana Power Company
Motorola, Inc.

NABER
Nassau County Police
National Telephone Coop.
Nevada Department Of Wildlife
New Hampshire Flying Tigers
New York City Police
Nippon Telegraph And Teleegraph
Northern States Power Co.
Pacific Bell And Nevada Bell
Pactel Paging
Paging Network, Inc.
Panhandle Eastern Corp.
Public Safety Communications Council
Questar Service Corp.
Sea, Inc.
Securicor Pmr Systems Ltd.
Senses International
Spacelabs Medical, Inc.
Sport Flyers Association
Telecommunications Industry Association
Texas Chapter, APCO
United Central Telephone
United Parcel Service
Utilities Telecommunications Council

APPENDIX C

LIST OF ACRONYMS

Acronym	Full Name of Commenter
AAA	American Automobile Association
AAR	Association of American Railroads
AASHTO	American Association of State Highway & Transportation Officials
Airborne Express	Airborne Express Corporation
Alarm Industry	Alarm Industry Communications Committee
AMI	Advanced Mobilecomm, Inc.
AM	Amplitude Modulation
AMRA	American Mobile Radio Association
AMST	Association of Maximum Service Television, Inc.
APCO	Association of Public Safety Communications Officers, Inc.
API	American Petroleum Institute
ARCO	Atlantic Richfield Company
ARINC	Aeronautical Radio, Inc.
Arizona APCO	Arizona Chapter of APCO
Arizona DoPS	Arizona Department of Public Safety
ATA	American Trucking Association, Inc.
ATA/FIT/ITLA/MRFAC	American Trucking Association, Inc./Forest Industries Telecommunications/International Taxicab & Livery Association/Manufacturers Radio Frequency Advisory Committee, Inc.
Blooston-Mordkofsky	Blooston, Mordkofsky, Jackson & Dickens
BPS	Bits Per Second
Brown and Schwaninger	Brown and Schwaninger
California DOT	California Department of Transportation
California PSRA	California Public Safety Radio Association, Inc.
Cedar Lake Fire	Cedar Lake Volunteer Fire Department
Chautaugua County EMS	Chautaugua County Emergency Medical Services
City of Dallas	The City of Dallas
Coastal	The Coastal Corporation
CMRS	Commercial Mobile Radio Service
CQPSK	Compatible Differential Offset Quadrature Phase Shift Keying
CSAA	Central Station Alarm Association
Cycomm	Cycomm Corporation
dBu	Decibel with respect to one microvolt
DOD	Department of Defense

EIA	Electronic Industries Association
E.F. Johnson	E. F. Johnson Company
E/GE	Ericsson/GE Communications, Inc. and the Ericsson Corporation
EMRS	Emergency Medical Radio Service
ERP	Effective Radiated Power
EUO	Exclusive Use Overlay
FCCA	Forestry-Conservation Communications Association
FDMA	Frequency Division Multiple Access
FM	Frequency Modulation
Florida DOT	Florida Department of Transportation
Florida Forestry Assc	The Florida Forestry Association
GEC-Marconi	GEC-Marconi Communications Limited
HAAT	Height Above Average Terrain
Hewlett-Packard	Hewlett-Packard Company
Illinois APCO	Illinois Chapter Association of Public Safety Communications Officers, Inc.
IMSA/IAFC	International Municipal Signal Association/International Association of Fire Chiefs, Inc.
Iowa DOT	Iowa Department of Transportation
Iowa Motor Truck Assc	Iowa Motor Truck Association
IRFA	Initial Regulatory Flexibility Analysis
ITA/CICS/TELFAC	Industrial Telecommunications Association, Inc./Council of independent Communication Suppliers/Telephone Maintenance Frequency Advisory Committee
KBPS	Kilobits Per Second
Kenwood	Kenwood Communications Corporation
Likini Cab Company	Likini Cab Company, Inc.
LMCC	Land Mobile Communications Council
Los Angeles	The City of Los Angeles
Madison DOT	Madison Department of Transportation
MACRS	Modified Accelerated Cost Recovery System
MCI	MCI Telecommunications Corporation
Montana APCO	Montana Chapter Associated Public-Safety Communications Officers
Montana Power	Montana Power Company
Motorola	Motorola, Inc.
NABER	National Association of Business and Educational Radio, Inc.
Nassau County Police	Nassau County Police Department
National Assoc. of State Foresters	National Association of State Foresters
National Telephone Coop Assc	National Telephone Cooperative Association
NB	Narrowband
New Jersey State Police	New Jersey Division of State Police

NJ Transit Rail	New Jersey Transit Rail
NTIA	National Telecommunications Information Administration
NTT	Nippon Telegraph and Telephone
NYC Police Department	New York City Police Department
Orange County CA	County of Orange, California
Pacific Bell	Pacific Bell and Nevada Bell
PCS	Personal Communications Services
Pennsylvania Turnpike Authority	
PLMR	Private Land Mobile Radio
PMRS	Private Mobile Radio Service
PPM	Parts Per Million
PSCC	Public Safety Communications Council
PowerSpectrum	PowerSpectrum, Inc.
Ritron	
Sacramento	Sacramento, California
San Diego County Sheriff	San Diego County Sheriff's Department
SEA	SEA, Inc.
Securicor	Securicor PMR Systems Ltd.
Signal Communcations	
SMR	Specialized Mobile Radio
Southern California Gas	Southern California Gas Company
Spacelabs	Spacelabs Medical, Inc.
Spectrum Resources	Spectrum Resources, Inc.
State of Colorado	
State of Florida	
State of Illinois	
State of Minnesota	
TDMA	Time Division Multiple Access
Texas	
Texas APCO	Texas Chaper Association of Public-Safety Communications Officers
Texas DoPS	Texas Department of Public Safety
TIA	Telecommunications Industry Association
UHF	Ultra-High Frequency
Uniden	Uniden America Corporation
Union Pacific	Union Pacific Railroad Company and Missouri Pacific Railroad Company
UPS	United Parcel Service of America
UK	United Kingdom
UTC	Utilities Telecommunications Council
Vetsch	Frank P. Vetsch/Radio Communications, Inc.
VHF	Very-High Frequency
Virginia Dept. of Health	Commonwealth of Virginia, Department of Health, Office of Emergency Medical Services

VNB	Very Narrow Band
Washington State Patrol	Washington State Patrol

APPENDIX D

FINAL REGULATORY FLEXIBILITY ANALYSIS

Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action.

This Report and Order amends Part 90 of the Commission's rules governing the PLMR services. Specifically, this Report and Order: 1) increases channel efficiency by splitting existing channels between 150 and 512 MHz; 2) provides users technical flexibility to convert to narrowband technology; 3) introduces new power/antenna height limitations that will permit advanced technologies and reduce interference; 4) specifies new technical standards for emission masks, frequency stability, and spectrum efficiency. These actions will reduce congestion, meet future communications capacity needs and generally permit, facilitate and encourage licensees to be spectrum efficient. These proposals will not unduly burden the public or increase administrative costs.

II. Summary of issues raised by public comments in response to the Initial Regulatory Flexibility Analysis.

No party addressed the Initial Regulatory Flexibility Analysis (IRFA), although several parties, including AAR and ATA, produced higher per unit estimates of the cost of reducing transmitter power and deviation.

III. Significant alternatives considered and rejected.

Several proposals were suggested by commenters regarding the appropriate channelization plan, transition period, and transmitter power/antenna heights. One alternative which received strong support from the user community was to adopt a 12.5 kHz channelization plan. Another alternative presented the view that narrowband is more efficient than 12.5 kHz technology and recommended that the Commission convert to this technology to make the most gains in relieving spectrum congestion. Based on the record before us, we adopt a flexible channelization plan which is a combination of the above plans and considers the needs and concerns of users. The plan gives users the option of converting directly to narrowband technology or allowing users to first use 12.5 kHz equipment and thereafter migrate to narrowband technology. The Commission also reviewed varying proposals from users, ranging from 10 to 26 years, regarding the appropriate transition period for implementation of the channelization plan. We again adopt a flexible approach which permits users to amortize existing investments over standard equipment life cycles. The rules adopted impose minimal hardship on users, as they consider the significant costs users have already expended in imbedded equipment. The Commission also considered

reducing the number of radio services. Generally, commenters did not agree on how many radio services should exist, which is a central issue in this debate. Therefore, in this document, because of the outstanding debate on this issue and several others issues, which need further discussion, we will not consolidate the radio services in this Report and Order. We believe that the move toward consolidation has merit and frequency coordinators of the radio services can greatly assist in the efficient implementation of the changes within this document. Consequently, we will allow frequency coordinators to submit a consolidation plan to the Commission within three months of the effective date of this item. Finally, we also considered the "safe-harbor" power approach recommended by LMCC, and found it to contain significant merit. We are adopting a modified version of LMCC's plan. Power will remain grandfathered until the licensed system is essentially replaced. Furthermore, most existing licensees meet the revised power limitations.

APPENDIX E

FURTHER INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared a Further Initial Regulatory Flexibility Analysis of the expected impact on small entities of the policies and rules proposed in the Further Notice of Proposed Rule Making.

1. Reason for Action: This rule making proceeding was initiated to secure comment on proposals for establishing shared exclusive assignments arrangements in the PLMR bands which will grant licensees flexibility to voluntarily adopt new technology and thereby achieve more efficient use of spectrum. We also propose to permit licensees who convert to narrowband technology to sell or lease excess capacity to PMRS eligibles as a means of enhancing the competitive potential of the PLMR services in the marketplace. The proposals advanced in the Further Notice of Proposed Rule Making are also designed to respond to the increasing need for spectrum and considerable changes in the mobile communications landscape.

2. Objectives: The Commission proposes changes to its rules for the PLMR services for use of spectrum in a manner that yields the greatest potential benefit to the public. Specifically, the exclusivity proposal will promote more efficient use of spectrum by encouraging licensees participating in exclusive sharing agreements to convert to innovative narrowband technology in an expeditious manner. Further, the proposal relating to the sale or lease of excess capacity will provide for the enhancement of the PLMR services by allowing marketplace mechanisms to intervene to give insight into the value of the PLMR bands to private eligibles. These new proposals will result in improving the quality of service, increasing the level of technology, and fostering economic growth in the private land mobile environment.

3. Legal Basis: The legal basis for these rule changes if found in Section 4(i), 303(g), 303(r), 332(a), 332(c), and 332(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 303(g), 303(r), 332(a), 332(c), and 332(d), as amended.

4. Reporting, Recordkeeping, and other Compliance Requirements: Under the proposal for shared exclusivity agreements in the Further Notice of Proposed Rule Making, existing licensees will be required to report information regarding its plans for implemention of narrowband systems within 5 year guidelines after entering the exclusivity arrangement. These reports will serve as a benchmark for the Commission to measure the progress of licensees in fulfilling their plans to determine whether a specific exclusivity agreement should be rescinded.

5. Federal Rules Which Overlap, Duplicate or Conflict With These Rules: None.

6. Description, Potential Impact, and Number of Small Entities Involved: The

Further Notice of Proposed Rule Making potentially affects numerous small entities, as the private land mobile services is comprised of millions of small business entities operating in urban and rural areas across the United States. The shared exclusivity and the sale or lease of excess capacity proposals are options available for small business licensees, as well as all other entities utilizing the private land mobile service. Many small entities could be positively affected by the proposals because they provide for new exclusive communications assignments that will foster new technologies and promote the competitive potential of the PLMR spectrum. The full extent of the impact on small entities cannot be predicted until various issues raised in the proceeding have been resolved. After evaluating the comments filed in response to the Further Notice, the Commission will examine further the impact of all final rules in this proceeding on small entities and set forth its findings in the Final Regulatory Flexibility Analysis.

7. **Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives:** This Further Notice of Proposed Rule Making solicits comments on a variety of alternatives. Any additional significant alternatives presented in the comments will also be considered.

APPENDIX F

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 90 - PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 is amended to read as follows:

Authority: Sections 4, 302, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 302, 303, and 332, unless otherwise noted.

2. Section 90.17 is amended by replacing the table of frequencies in paragraph (b) , revising limitation (13), replacing limitation (24), and adding limitations (28), (29), and (30) in paragraph (c), and replacing paragraph (e)(3) to read as follows:

§ 90.17 Local Government Radio Service.

* * * * *

(b) * * *

Local Government Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Kilohertz:		
530	Base (T.I.S.)	23
1610	do	23
2726	Base or mobile	1
2000 to 10.000	Fixed, base or mobile	25
Megahertz:		
37.10	Base or mobile	2
37.18	do	2
37.26	do	2
39.06	Mobile	2, 3
39.10	Base or mobile	2
39.18	do	2
39.50	do	2
39.58	do	2
39.82	do	2
39.90	do	2
39.98	do	2
45.08	do	
45.12	do	
45.16	do	
45.20	do	
45.24	do	
45.28	do	
45.32	do	
45.36	do	
45.40	do	
45.44	do	
45.48	do	
45.52	do	
45.56	do	
45.60	do	
45.64	do	
46.52	do	
46.54	do	
46.56	do	
46.58	do	
72.00 to 76.00	Operational fixed	6
150 to 170	Base or Mobile	29
153.740	Mobile	
153.7475	do	24
153.755	do	
153.7625	do	24
153.785	do	
153.7925	do	24
153.800	do	
153.8075	do	24
153.815	do	
153.8225	do	24
153.845	do	
153.8525	do	24
153.860	do	
153.8675	do	24

Frequency or band	Class of station(s)	Limitations
153.875	do	
153.8825	do	24
153.905	do	
153.9125	do	24
153.920	do	
153.9275	do	24
153.935	do	
153.9425	do	24
153.965	do	
153.9725	do	24
153.980	do	
153.9875	do	24
153.995	do	
154.0025	do	24
154.025	Base or mobile	
154.0325	do	24
154.040	do	5
154.0475	do	5, 24
154.055	do	5
154.0625	do	5, 24
154.085	do	5
154.0925	do	5, 24
154.100	do	5
154.1075	do	5, 24
154.115	do	5
154.1225	do	5, 24
154.45625	Fixed or mobile	9, 20, 21, 22
154.46375	do	7, 19, 20, 21, 22
154.47125	do	7, 20, 21, 22
154.47875	do	19, 20, 21, 22
154.965	Base or mobile	
154.9725	do	24
154.980	do	
154.9875	do	24
154.995	do	
155.0025	do	24
155.025	do	
155.0325	do	24
155.040	do	
155.0475	do	24
155.055	do	
155.0625	do	24
155.085	do	
155.0925	do	24
155.100	do	
155.1075	do	24
155.115	do	
155.1225	do	24
155.145	do	
155.1525	do	24
155.715	do	
155.7225	do	24
155.745	do	
155.7525	do	24
155.760	do	
155.7675	do	24
155.775	do	
155.7825	do	24
155.805	do	
155.8125	do	24
155.820	do	
155.8275	do	24
155.835	do	
155.8425	do	24
155.865	do	
155.8725	do	24
155.880	do	
155.8875	do	24
155.895	do	
155.9025	do	24
155.925	do	
155.9325	do	24
155.940	do	
155.9475	do	24
155.955	do	
155.9625	do	24
155.985	Mobile	
155.9925	do	24
156.000	do	
156.0075	do	24
156.015	do	
156.0225	do	24
158.745	Base and mobile	
158.7525	do	24
158.760	do	
158.7675	do	24
158.775	do	
158.7825	do	24
158.805	do	
158.8125	do	24
158.820	do	
158.8275	do	24
158.835	do	
158.8425	do	24
158.865	Mobile	
158.8725	do	24
158.880	do	
158.8875	do	24
158.895	do	
158.9025	do	24
158.925	do	
158.9325	do	24
158.940	do	
158.9475	do	24
158.955	do	
158.9625	do	24
169-172	do	27
173.20375	Fixed or mobile	7, 20, 21, 22
173.2100	do	7, 8, 21, 22
173.2375	do	9, 20, 21, 22
173.2625	do	9, 20, 21, 22
173.2875	do	9, 20, 21, 22
173.3125	do	9, 20, 21, 22
173.3375	do	9, 20, 21, 22
173.3625	do	9, 20, 21, 22
173.3900	do	7, 8, 21, 22
173.39625	do	7, 20, 21, 22
220 to 222	Base and mobile	4
450 to 470	Fixed, base, or mobile	10, 29
453.0125	Mobile	30

Frequency or band	Class of station(s)	Limitations
453.025	Central control, fixed	11
453.0375	Base or mobile	24
453.050	do	12
453.05625	do	12, 28
453.06250	do	12, 24
453.06875	do	12, 28
453.075	Central control, fixed	11
453.0875	Base or mobile	24
453.100	do	12
453.10625	do	12, 28
453.11250	do	12, 24
453.11875	do	12, 28
453.125	Central control, fixed	11
453.1375	Base or mobile	24
453.150	do	12
453.15625	do	12, 28
453.16250	do	12, 24
453.16875	do	12, 28
453.175	Central control, fixed	11
453.1875	Base or mobile	24
453.200	do	12
453.20625	do	12, 28
453.21250	do	12, 24
453.21875	do	12, 28
453.225	do	
453.23125	do	28
453.23750	do	24
453.24375	do	28
453.250	do	12
453.25625	do	12, 28
453.26250	do	12, 24
453.26875	do	12, 28
453.275	do	
453.28125	do	28
453.28750	do	24
453.29375	do	28
453.300	do	12
453.30625	do	12, 28
453.31250	do	12, 24
453.31875	do	12, 28
453.325	do	
453.33125	do	28
453.33750	do	24
453.34375	do	28
453.350	do	12
453.35625	do	12, 28
453.36250	do	12, 24
453.36875	do	12, 28
453.375	do	
453.38125	do	28
453.38750	do	24
453.39375	do	28
453.400	do	12
453.40625	do	12, 28
453.41250	do	12, 24
453.41875	do	12, 28
453.425	do	
453.43125	do	28
453.43750	do	24
453.44375	do	28
453.450	do	12
453.45625	do	12, 28
453.46250	do	12, 24
453.46875	do	12, 28
453.475	do	
453.48125	do	28
453.48750	do	24
453.49375	do	28
453.500	do	12
453.50625	do	12, 28
453.51250	do	12, 24
453.51875	do	12, 28
453.525	do	
453.53125	do	28
453.53750	do	24
453.54375	do	28
453.550	do	12
453.55625	do	12, 28
453.56250	do	12, 24
453.56875	do	12, 28
453.575	do	
453.58125	do	28
453.58750	do	24
453.59375	do	28
453.600	Base or mobile	12
453.60625	do	12, 28
453.61250	do	12, 24
453.61875	do	12, 28
453.625	do	
453.63125	do	28
453.63750	do	24
453.64375	do	28
453.650	do	12
453.65625	do	12, 28
453.66250	do	12, 24
453.66875	do	12, 28
453.675	do	
453.68125	do	28
453.68750	do	24
453.69375	do	28
453.700	do	12
453.70625	do	12, 28
453.71250	do	12, 24
453.71875	do	12, 28
453.725	do	
453.73125	do	28
453.73750	do	24
453.74375	do	28
453.750	do	12
453.75625	do	12, 28
453.76250	do	12, 24
453.76875	do	12, 28
453.775	do	
453.78125	do	28
453.78750	do	24
453.79375	do	28
453.800	do	12
453.80625	do	12, 28
453.81250	do	12, 24
453.81875	do	12, 28

Frequency or band	Class of station(s)	Limitations
453.825	do	
453.83125	do	28
453.83750	do	24
453.84375	do	28
453.850	do	12
453.85625	do	12, 28
453.86250	do	12, 24
453.86875	do	12, 28
453.875	do	
453.88125	do	28
453.88750	do	24
453.89375	do	28
453.900	do	12
453.90625	do	12, 28
453.91250	do	12, 24
453.91875	do	12, 28
453.925	do	
453.93125	do	28
453.93750	do	24
453.94375	do	28
453.950	do	12
453.95625	do	12, 28
453.96250	do	12, 24
453.96875	do	12, 28
453.975	do	
453.98125	do	28
453.98750	do	24
453.99375	do	28
458.025	Radio call boxes, fixed	11, 13
458.03750	Mobile	24
458.050	do	12
458.05625	do	12, 28
458.06250	do	12, 24
458.06875	do	12, 28
458.075	Radio call boxes, fixed	11, 13
458.08750	Mobile	24
458.100	do	12
458.10625	do	12, 28
458.11250	do	12, 24
458.11875	do	12, 28
458.125	Radio call boxes, fixed	11, 13
458.13750	Mobile	24
458.150	do	12
458.15625	do	12, 28
458.16250	do	12, 24
458.16875	do	12, 28
458.175	Radio call boxes, fixed	11, 13
458.18750	Mobile	24
458.200	do	12
458.20625	do	12, 28
458.21250	do	12, 24
458.21875	do	12, 28
458.225	do	
458.23125	do	28
458.23750	do	24
458.24375	do	28
458.250	do	12
458.25625	do	12, 28
458.26250	do	12, 24
458.26875	do	12, 28
458.275	do	
458.28125	do	28
458.28750	do	24
458.29375	do	28
458.300	do	12
458.30625	do	12, 28
458.31250	do	12, 24
458.31875	do	12, 28
458.325	do	
458.33125	do	28
458.33750	do	24
458.34375	do	28
458.350	do	12
458.35625	do	12, 28
458.36250	do	12, 24
458.36875	do	12, 28
458.375	do	
458.38125	do	28
458.38750	do	24
458.39375	do	28
458.400	do	12
458.40625	do	12, 28
458.41250	do	12, 24
458.41875	do	12, 28
458.425	do	
458.43125	do	28
458.43750	do	24
458.44375	do	28
458.450	do	12
458.45625	do	12, 28
458.46250	do	12, 24
458.46875	do	12, 28
458.475	do	
458.48125	do	28
458.48750	do	24
458.49375	do	28
458.500	do	12
458.50625	do	12, 28
458.51250	do	12, 24
458.51875	do	12, 28
458.525	do	
458.53125	do	28
458.53750	do	24
458.54375	do	28
458.550	do	12
458.55625	do	12, 28
458.56250	do	12, 24
458.56875	do	12, 28
458.575	do	
458.58125	do	28
458.58750	do	24
458.59375	do	28
458.600	do	12
458.60625	do	12, 28
458.61250	do	12, 24
458.61875	do	12, 28
458.625	do	
458.63125	do	28
458.63750	do	24
458.64375	do	28

Frequency or band	Class of station(s)	Limitations
458.650	do	12
458.65625	do	12, 28
458.66250	do	12, 24
458.66875	do	12, 28
458.675	do	
458.68125	do	28
458.68750	do	24
458.69375	do	28
458.700	do	12
458.70625	do	12, 28
458.71250	do	12, 24
458.71875	do	12, 28
458.725	do	
458.73125	do	28
458.73750	do	24
458.74375	do	28
458.750	do	12
458.75625	do	12, 28
458.76250	do	12, 24
458.76875	do	12, 28
458.775	do	
458.78125	do	28
458.78750	do	24
458.79375	do	28
458.800	do	12
458.80625	do	12, 28
458.81250	do	12, 24
458.81875	do	12, 28
458.825	do	
458.83125	do	28
458.83750	do	24
458.84375	do	28
458.850	do	12
458.85625	do	12, 28
458.86250	do	12, 24
458.86875	do	12, 28
458.875	do	
458.88125	do	28
458.88750	do	24
458.89375	do	28
458.900	do	12
458.90625	do	12, 28
458.91250	do	12, 24
458.91875	do	12, 28
458.925	do	
458.93125	do	28
458.93750	do	24
458.94375	do	28
458.950	do	12
458.95625	do	12, 28
458.96250	do	12, 24
458.96875	do	12, 28
458.975	do	
458.98125	do	28
458.98750	do	24
458.99375	do	28
470 to 512	Base or mobile	14
806 to 824	Mobile	15
851 to 869	Base or mobile	15
928 and above	Operational-fixed	16
929-930	Base only	26
1427 to 1435	Operational fixed, base or mobile	17
2450 to 2500	Base or mobile	18
10,550 to 10,680*	do	

<*> The frequencies in the band 10.55-10.68 GHz are available for Digital Termination Systems and for associated internodal links in the Point-to-Point Microwave Radio Service. No new licenses will be issued under this Subpart but current licenses will be renewed.

(c) * * *

(13) Available for medical services mobile operations in the Emergency Medical Radio Service in accordance with § 90.27(c)(22)

* * * * *

(24) This frequency is not available in the 150-170 MHz band until August 16, 1996. This frequency will be assigned with an authorized bandwidth not to exceed 11.25 kHz. In the 450-470 MHz band, secondary telemetry operations pursuant to § 90.238(e) will be authorized on this frequency.

* * * * *

(28) This frequency is not available until August 16, 1996. After August 16, 1996 this frequency will be assigned with an authorized bandwidth not to exceed 6 kHz.

(29) Assignment of frequencies in this band are subject to the provisions of § 90.173

(30) This frequency is available for systems first licensed prior to August 16, 1995. No new systems will be authorized after August 16, 1995, but prior authorized systems may be modified, expanded, and renewed.

* * * * *

(e) * * *

(3) Frequencies in the 25-50 MHz, 150-170 MHz, 450-512 MHz and 902-928 MHz bands may be assigned for the operation of Location and Monitoring Service (LMS) systems in accordance with the provisions of subpart M, notwithstanding this limitation.

* * * * *

3. Section 90.19 is amended by replacing the table of frequencies in paragraph (d), revising limitations (19), and (26), adding limitations (32), (33), and (34) in paragraph (e), revising paragraph (f)(5)(ii), adding paragraph (g)(3)(iii), and replacing paragraph (g)(5) to read as follows:

§ 90.19 Police Radio Service.

* * * * *

(d) * * *

Police Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Kilohertz:		
851 to 856	Base or Mobile	22
928 and above	Operational-fixed	23
929 to 930	Base only	27
1427 to 1435	Operational-fixed, base or mobile	24
1722	do	2, 3
1730	do	2, 3
2366	do	1, 2
2382	do	2
2390	do	1, 2
2406	do	2
2430	do	2
2442	do	2
2450	do	2
2458	do	2
2482	do	2
2490	do	2, 3
Megahertz:		
37.02	Mobile	
37.04	Base or mobile	
37.06	do	
37.08	do	
37.10	do	9
37.12	do	
37.14	do	
37.16	do	
37.18	do	9
37.20	do	
37.22	do	
37.24	do	
37.26	do	9
37.28	do	
37.30	do	
37.32	do	
37.34	Mobile	
37.36	Base or mobile	
37.38	Mobile	
37.40	Base or mobile	
37.42	Mobile	
39.02	Base or mobile	
39.04	do	
39.06	do	9, 10
39.08	do	
39.10	do	9
39.12	do	
39.14	do	
39.16	do	
39.18	do	9
39.20	do	
39.22	do	
39.24	do	
39.26	Mobile	
39.28	Base or mobile	
39.30	Mobile	
39.32	Base or mobile	
39.34	Mobile	
39.36	Base or mobile	
39.38	Mobile	
39.40	Base or mobile	
39.42	do	
39.44	do	
39.46	do	11
39.48	do	
39.50	do	9
39.52	do	
39.54	do	
39.56	do	
39.58	do	9
39.60	do	
39.62	do	
39.64	do	
39.66	Mobile	
39.68	Base or mobile	
39.70	Mobile	
39.72	Base or mobile	
39.74	Mobile	
39.76	Base or mobile	
39.78	Mobile	
39.80	Base or mobile	
39.82	do	9
39.84	do	
39.86	do	
39.88	do	
39.90	do	9
39.92	do	
39.94	do	
39.96	do	
39.98	do	9
42.02	do	2, 3, 12
42.04	do	2, 3, 12
42.06	do	2, 3, 12
42.08	do	2, 3, 12
42.10	do	2, 3, 12
42.12	do	2, 3, 12
42.14	do	2, 3, 12
42.16	do	2, 3, 12
42.18	Mobile	2, 12

Frequency or band	Class of station(s)	Limitations
458.55625	do	16, 32
458.56250	do	16, 26
458.56875	do	16, 32
458.5875	do	34
458.600	do	16
458.60625	do	16, 32
458.61250	do	16, 26
458.61875	do	16, 32
458.6375	do	34
458.650	do	16
458.65625	do	16, 32
458.66250	do	16, 26
458.66875	do	16, 32
458.6875	do	34
458.700	do	16
458.70625	do	16, 32
458.71250	do	16, 26
458.71875	do	16, 32
458.7375	do	34
458.750	do	16
458.75625	do	16, 32
458.76250	do	16, 26
458.76875	do	16, 32
458.7875	do	34
458.800	do	16
458.80625	do	16, 32
458.81250	do	16, 26
458.81875	do	16, 32
458.8375	do	34
458.850	do	16
458.85625	do	16, 32
458.86250	do	16, 26
458.86875	do	16, 32
458.8875	do	34
458.900	do	16
458.90625	do	16, 32
458.91250	do	16, 26
458.91875	do	16, 32
458.9375	do	34
458.950	do	16
458.95625	do	16, 32
458.96250	do	16, 26
458.96875	do	16, 32
460.0125	do	34
460.01875	Base or mobile	32
460.025	do	
460.03125	do	32
460.03750	do	26
460.04375	do	32
460.050	do	
460.05625	do	32
460.06250	do	26
460.06875	do	32
460.075	do	
460.08125	do	32
460.08750	do	26
460.09375	do	32
460.100	do	
460.10625	do	32
460.11250	do	26
460.11875	do	32
460.125	do	
460.13125	do	32
460.13750	do	26
460.14375	do	32
460.150	do	
460.15625	do	32
460.16250	do	26
460.16875	do	32
460.175	do	
460.18125	do	32
460.18750	do	26
460.19375	do	32
460.200	do	
460.20625	do	32
460.21250	do	26
460.21875	do	32
460.225	do	
460.23125	do	32
460.23750	do	26
460.24375	do	32
460.250	do	
460.25625	do	32
460.26250	do	26
460.26875	do	32
460.275	do	
460.28125	do	32
460.28750	do	26
460.29375	do	32
460.300	do	
460.30625	do	32
460.31250	do	26
460.31875	do	32
460.325	do	
460.33125	do	32
460.33750	do	26
460.34375	do	32
460.350	do	
460.35625	do	32
460.36250	do	26
460.36875	do	32
460.375	do	
460.38125	do	32
460.38750	do	26
460.39375	do	32
460.400	do	
460.40625	do	32
460.41250	do	26
460.41875	do	32
460.425	do	
460.43125	do	32
460.43750	do	26
460.44375	do	32
460.450	do	
460.45625	do	32
460.46250	do	26
460.46875	do	32
460.475	do	
460.48125	do	32
460.48750	do	26

Frequency or band	Class of station(s)	Limitations
460.49375	do	32
460.500	do	
460.50625	do	32
460.51250	do	26
460.51875	do	32
460.525	do	17
460.53125	do	17, 32
460.53750	do	17, 26
460.54375	do	17, 32
460.550	do	17
460.55625	do	17, 32
460.56250	do	17, 26
460.56875	do	17, 32
465.0125	Mobile	34
465.025	do	
465.03125	do	32
465.03750	do	26
465.04375	do	32
465.050	do	
465.05625	do	32
465.06250	do	26
465.06875	do	32
465.075	do	
465.08125	do	32
465.08750	do	26
465.09375	do	32
465.100	do	
465.10625	do	32
465.11250	do	26
465.11875	do	32
465.125	do	
465.13125	do	32
465.13750	do	26
465.14375	do	32
465.150	do	
465.15625	do	32
465.16250	do	26
465.16875	do	32
465.175	do	
465.18125	do	32
465.18750	do	26
465.19375	do	32
465.200	do	
465.20625	do	32
465.21250	do	26
465.21875	do	32
465.225	do	
465.23125	do	32
465.23750	do	26
465.24375	do	32
465.250	do	
465.25625	do	32
465.26250	do	26
465.26875	do	32
465.275	do	
465.28125	do	32
465.28750	do	26
465.29375	do	32
465.300	do	
465.30625	do	32
465.31250	do	26
465.31875	do	32
465.325	do	
465.33125	do	32
465.33750	do	26
465.34375	do	32
465.350	do	
465.35625	do	32
465.36250	do	26
465.36875	do	32
465.375	do	
465.38125	do	32
465.38750	do	26
465.39375	do	32
465.400	do	
465.40625	do	32
465.41250	do	26
465.41875	do	32
465.425	do	
465.43125	do	32
465.43750	do	26
465.44375	do	32
465.450	do	
465.45625	do	32
465.46250	do	26
465.46875	do	32
465.475	do	
465.48125	do	32
465.48750	do	26
465.49375	do	32
465.500	do	
465.50625	do	32
465.51250	do	26
465.51875	do	32
465.525	do	17
465.53125	do	17, 32
465.53750	do	17, 26
465.54375	do	17, 32
465.550	Base or mobile	17
465.55625	do	17, 32
465.56250	do	17, 26
465.56875	do	17, 32
470-512	do	21
806-824	Mobile	22
851-869	Base or mobile	22
928 and above	Operational-fixed	23
929-930	Base only	27
1427 to 1435	Operational fixed, base or mobile	24
2450 to 2500	Base or mobile	25
10,550 to 10,680*	do	

*The frequencies in the band 10.55-10.68 GHz are available for Digital Termination Systems and for associated internodal links in the Point-to-Point Microwave Radio Service. No new licenses will be issued under this Subpart but current licenses will be renewed.

(e) * * *

(19) [Reserved]

* * * * *

(26) This frequency is not available in the 150-170 MHz band until August 16, 1996. This frequency will be assigned with an authorized bandwidth not to exceed 11.25 kHz. In the 450-470 MHz band, secondary telemetry operations pursuant to § 90.238(e) will be authorized on this frequency.

* * * * *

(32) This frequency is not available until August 16, 1996. After August 16, 1996 this frequency will be assigned with an authorized bandwidth not to exceed 6 kHz.

(33) Assignment of frequencies in this band are subject to the provisions of § 90.173

(34) This frequency is available for systems first licensed prior to August 16, 1995. No new systems will be authorized after August 16, 1995, but prior authorized systems may be modified, expanded, and renewed.

(f) * * *

(5) * * *

(ii) * * *

460.0125- 460.5125

* * * * *

465.0125-465.5125

* * * * *

(g) * * *

(3) * * *

(iii) The use of direct sequence spread spectrum equipment is also permitted. Equipment must meet the technical standards of 47 C.F.R. § 15.247.

* * * * *

(5) Frequencies in the 25-50 MHz, 150-170 MHz, 450-512 MHz and 902-928 MHz bands may be assigned for the operation of Location and Monitoring Service (LMS) systems in accordance with the provisions of subpart M, notwithstanding this limitation.

* * * * *

4. Section 90.21 is amended by replacing the table of frequencies in paragraph (b), replacing limitation (16), and adding limitations (20), (21), and (22) in paragraph (c), and replacing paragraph (e)(3) to read as follows:

§ 90.21 Fire Radio Service.

* * * * *

(b) * * *

Fire Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Kilohertz:		
1630	Base or mobile	
Megahertz:		
33.42	Mobile or fixed	1
33.44	Base or mobile	
33.46	Mobile	
33.48	Base or mobile	
33.50	Mobile	
33.52	Base or mobile	
33.54	Mobile	
33.56	Base or mobile	
33.58	Mobile	
33.60	Base or mobile	
33.62	Mobile	
33.64	Base or mobile	
33.66	Mobile	
33.68	Base or mobile	
33.70	do	
33.72	do	
33.74	do	
33.76	do	
33.78	do	
33.80	do	
33.82	do	
33.84	do	
33.86	do	
33.88	do	
33.90	do	
33.92	do	
33.94	do	
33.96	do	
33.98	do	
45.88	do	2
46.06	do	
46.08	do	
46.10	do	
46.12	do	
46.14	do	
46.16	do	
46.18	do	
46.20	do	
46.22	Mobile	
46.24	do	
46.26	do	
46.28	do	
46.30	Mobile or fixed	1
46.32	Mobile	
46.34	do	
46.36	Base or mobile	
46.38	do	
46.40	do	
46.42	do	
46.44	do	
46.46	do	
46.48	do	
46.50	do	
72.00 to 76.00	Operational fixed	3
72.44	Mobile	19
72.48	do	19
72.52	do	19
72.56	do	19
72.60	do	19
75.44	do	19
75.48	do	19
75.52	do	19
75.56	do	19

Frequency or band	Class of station(s)	Limitations
75.60	do	19
150 to 170	Base or mobile	21
153.77	Mobile	
153.7775	do	16
153.83	Mobile	18
153.8375	do	18, 16
153.890	Mobile	
153.8975	do	16
153.950	do	
153.9575	do	16
154.010	do	
154.0175	do	16
154.070	do	4
154.0775	do	4, 16
154.130	Base or mobile	4
154.1375	do	4, 16
154.145	do	4
154.1525	do	4, 16
154.160	do	4
154.1675	do	4, 16
154.175	do	4
154.1825	do	4, 16
154.190	do	4
154.1975	do	4, 16
154.205	do	4
154.2125	do	4, 16
154.220	do	4
154.2275	do	4, 16
154.235	do	4
154.2425	do	4, 16
154.250	do	4
154.2575	do	4, 16
154.265	do	2, 4
154.2725	do	2, 4, 16
154.280	do	2, 4
154.2875	do	2, 4, 16
154.295	do	2, 4
154.3025	do	2, 4, 16
154.310	do	4
154.3175	do	4, 16
154.325	do	4
154.3325	do	4, 16
154.340	do	4
154.3475	do	4, 16
154.355	do	4
154.3625	do	4, 16
154.370	do	4
154.3775	do	4, 16
154.385	do	4
154.3925	do	4, 16
154.400	do	4
154.4075	do	4, 16
154.415	do	4
154.4225	do	4, 16
154.430	do	4
154.4375	do	4, 16
154.445	do	4
154.4525	do	4, 16
166.250	do	5
169-172	Mobile	14
170.150	Base or mobile	5
220-222	Base and mobile	17
450-470	Fixed, base, or mobile	6, 21
453.0375	Mobile	22
453.050	Base or mobile	7
453.05625	do	20
453.06250	do	16
453.06875	do	20
453.0875	Mobile	22
453.100	Base or mobile	7
453.10625	do	7, 20
453.11250	do	7, 16
453.11875	do	7, 20
453.1375	Mobile	22
453.150	Base or mobile	7
453.15625	do	7, 20
453.16250	do	7, 16
453.16875	do	7, 20
453.1875	Mobile	22
453.200	Base or mobile	7
453.20625	do	7, 20
453.21250	do	7, 16
453.21875	do	7, 20
453.2375	Mobile	22
453.250	Base or mobile	7
453.25625	do	7, 20
453.26250	do	7, 16
453.26875	do	7, 20
453.2875	Mobile	22
453.300	Base or mobile	7
453.30625	do	7, 20
453.31250	do	7, 16
453.31875	do	7, 20
453.3375	Mobile	22
453.350	Base or mobile	7
453.35625	do	7, 20
453.36250	do	7, 16
453.36875	do	7, 20
453.3875	Mobile	22
453.400	Base or mobile	7
453.40625	do	7, 20
453.41250	do	7, 16
453.41875	do	7, 20
453.4375	Mobile	22
453.450	Base or mobile	7
453.45625	do	7, 20
453.46250	do	7, 16
453.46875	do	7, 20
453.4875	Mobile	22
453.500	Base or mobile	7
453.50625	do	7, 20
453.51250	do	7, 16
453.51875	do	7, 20
453.5375	Mobile	22
453.550	Base or mobile	7
453.55625	do	7, 20
453.56250	do	7, 16
453.56875	do	7, 20
453.5875	Mobile	22
453.600	Base or mobile	7

Frequency or band	Class of station(s)	Limitations
453.60625	do	7, 20
453.61250	do	7, 16
453.61875	do	7, 20
453.6375	Mobile	22
453.650	Base or mobile	7
453.65625	do	7, 20
453.66250	do	7, 16
453.66875	do	7, 20
453.6875	Mobile	22
453.700	Base or mobile	7
453.70625	do	7, 20
453.71250	do	7, 16
453.71875	do	7, 20
453.7375	Mobile	22
453.750	Base or mobile	7
453.75625	do	7, 20
453.76250	do	7, 16
453.76875	do	7, 20
453.7875	Mobile	22
453.800	Base or mobile	7
453.80625	do	7, 20
453.81250	do	7, 16
453.81875	do	7, 20
453.8375	Mobile	22
453.850	Base or mobile	7
453.85625	do	7, 20
453.86250	do	7, 16
453.86875	do	7, 20
453.8875	Mobile	22
453.900	Base or mobile	7
453.90625	do	7, 20
453.91250	do	7, 16
453.91875	do	7, 20
453.9375	Mobile	22
453.950	Base or mobile	7
453.95625	do	7, 20
453.96250	do	7, 16
453.96875	do	7, 20
458.0375	Mobile	22
458.050	do	7
458.05625	do	7, 20
458.06250	do	7, 16
458.06875	do	7, 20
458.0875	do	22
458.100	do	7
458.10625	do	7, 20
458.11250	do	7, 16
458.11875	do	7, 20
458.1375	do	22
458.150	do	7
458.15625	do	7, 20
458.16250	do	7, 16
458.16875	do	7, 20
458.1875	do	22
458.200	do	7
458.20625	do	7, 20
458.21250	do	7, 16
458.21875	do	7, 20
458.2375	do	22
458.250	do	7
458.25625	do	7, 20
458.26250	do	7, 16
458.26875	do	7, 20
458.2875	do	22
458.300	do	7
458.30625	do	7, 20
458.31250	do	7, 16
458.31875	do	7, 20
458.3375	do	22
458.350	do	7
458.35625	do	7, 20
458.36250	do	7, 16
458.36875	do	7, 20
458.3875	do	22
458.400	do	7
458.40625	do	7, 20
458.41250	do	7, 16
458.41875	do	7, 20
458.4375	do	22
458.450	do	7
458.45625	do	7, 20
458.46250	do	7, 16
458.46875	do	7, 20
458.4875	do	22
458.500	do	7
458.50625	do	7, 20
458.51250	do	7, 16
458.51875	do	7, 20
458.5375	do	22
458.550	do	7
458.55625	do	7, 20
458.56250	do	7, 16
458.56875	do	7, 20
458.5875	do	22
458.600	do	7
458.60625	do	7, 20
458.61250	do	7, 16
458.61875	do	7, 20
458.6375	do	22
458.650	do	7
458.65625	do	7, 20
458.66250	do	7, 16
458.66875	do	7, 20
458.6875	do	22
458.700	do	7
458.70625	do	7, 20
458.71250	do	7, 16
458.71875	do	7, 20
458.7375	do	22
458.750	do	7
458.75625	do	7, 20
458.76250	do	7, 16
458.76875	do	7, 20
458.7875	do	22
458.800	do	7
458.80625	do	7, 20
458.81250	do	7, 16
458.81875	do	7, 20
458.8375	do	22
458.850	do	7

Frequency or band	Class of station(s)	Limitations
458.85625	do	7, 20
458.86250	do	7, 16
458.86875	do	7, 20
458.8875	do	22
458.900	do	7
458.90625	do	7, 20
458.91250	do	7, 16
458.91875	do	7, 20
458.9375	do	22
458.950	do	7
458.95625	do	7, 20
458.96250	do	7, 16
458.96875	do	7, 20
460.5125	Mobile	22
460.525	Base or Mobile	8
460.53125	do	8, 20
460.53750	do	8, 16
460.54375	do	8, 20
460.550	do	8
460.55625	do	8, 20
460.56250	do	8, 16
460.56875	do	8, 20
460.575	do	
460.58125	do	20
460.58750	do	16
460.59375	do	20
460.600	do	
460.60625	do	20
460.61250	do	16
460.61875	do	20
460.625	do	
460.63125	do	20
460.63750	do	16
460.64375	do	20
465.5125	Mobile	22
465.525	do	8
465.53125	do	8, 20
465.53750	do	8, 16
465.54375	do	8, 20
465.550	do	8
465.55625	do	8, 20
465.56250	do	8, 16
465.56875	do	8, 20
465.575	do	
465.58125	do	20
465.58750	do	16
465.59375	do	20
465.600	do	
465.60625	do	20
465.61250	do	16
465.61875	do	20
465.625	do	
465.63125	do	20
465.63750	do	16
465.64375	do	20
470-512	Base or mobile	9
806-824	Mobile	10
851-869	Base or mobile	10
928 and above	Operational-fixed	11
929-930	Base only	15
1427 to 1435	Operational fixed, base or mobile	12
2450 to 2500	Base or mobile	13
10,550 to 10,680*	do	

*The frequencies in the band 10.55-10.68 GHz are available for Digital Termination Systems and for associated internodal links in the Point-to-Point Microwave Radio Service. No new licenses will be issued under this Subpart but current licenses will be renewed.

(c) * * *

(16) This frequency is not available in the 150-170 MHz band until August 16, 1996. This frequency will be assigned with an authorized bandwidth not to exceed 11.25 kHz. In the 450-470 MHz band, secondary telemetry operations pursuant to § 90.238(e) will be authorized on this frequency.

* * * * *

(20) This frequency is not available until August 16, 1996. After August 16, 1996 this frequency will be assigned with an authorized bandwidth not to exceed 6 kHz.

(21) Assignment of frequencies in this band are subject to the provisions of § 90.173

(22) This frequency is available for systems first licensed prior to August 16, 1995. No new systems will be authorized after August 1, 1995, but prior authorized systems may be modified, expanded, and renewed.

* * * * *

(e) * * *

(3) Frequencies in the 25-50 MHz, 150-170 MHz, 450-512 MHz and 902-928 MHz bands may be assigned for the operation of Location and Monitoring Service (LMS) systems in accordance with the provisions of subpart M, notwithstanding this limitation.

* * * * *

5. Section 90.23 is amended by replacing the table of frequencies in paragraph (b), replacing limitation (18), and adding limitations (20), (21), (22), and (23) in paragraph (c), and replacing paragraph (e)(2) to read as follows:

§ 90.23 Highway Maintenance Radio Service.

* * * * *

(b) * * *

Highway Maintenance Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Megahertz:		
33.02	Base or mobile	1
33.06	do	1
33.10	do	1
37.90	do	1
37.92	do	
37.94	do	1
37.96	do	
37.98	do	1
45.68	do	
45.72	do	
45.76	do	
45.80	do	
45.84	do	
1247.02	do	2, 17
1247.04	do	2, 17
1247.06	do	2, 17
1247.08	do	2, 17
1247.10	do	2, 17
1247.12	do	2, 17
1247.14	do	2, 17
1247.16	do	2, 17
1247.18	do	2, 17
1247.20	do	2, 17
1247.22	do	2, 17
1247.24	do	2, 17
1247.26	do	2, 17
1247.28	do	2, 17
1247.30	do	2, 17
1247.32	do	2, 17
1247.34	do	2, 17
1247.36	do	2, 17
1247.38	do	2, 17
1247.40	do	2, 17
72.00 to 76.00	Operational fixed	3
150 to 170	Base or mobile	21
150.995	do	4
151.0025	do	4, 18
151.010	do	4
151.0175	do	4, 18
151.025	do	4
151.0325	do	4, 18
151.040	do	4
151.0475	do	4, 18
151.055	do	4
151.070	do	4, 22
151.085	do	4
151.0925	do	4, 18
151.100	do	4
151.1075	do	4, 18
151.115	do	4
151.1225	do	4, 18
151.130	do	4
151.1375	do	4, 18
156.045	Mobile	14
156.0525	do	14, 18
156.060	do	14
156.0675	do	14, 18
156.075	do	
156.0825	do	18
156.105	Base or mobile	
156.1125	do	18
156.120	do	
156.1275	do	18
156.135	do	
156.1425	do	18
156.165	do	5, 14
156.1725	do	5, 14, 18
156.180	do	5, 14
156.1875	do	5, 14, 18
156.195	do	5
156.2025	do	5, 18
156.225	do	5
156.2325	do	5, 18
156.240	do	5
156.2475	do	5, 20
158.985	Mobile	5
158.9925	do	5, 18
159.000	do	5
159.0075	do	5, 18
159.015	do	5
159.0225	do	5, 18
159.045	do	5
159.0525	do	5, 18
159.060	do	5
159.0675	do	5, 18
159.075	do	5
159.0825	do	5, 18
159.105	Base or mobile	5
159.1125	do	5, 18
159.120	do	5
159.1275	do	5, 18
159.135	do	5
159.1425	do	5, 18
159.165	do	5
159.1725	do	5, 18
159.180	do	

Frequency or band	Class of station(s)	Limitations
159.1875	do	18
159.195	do	
159.2025	do	18
169-172	Mobile	15
220-222	Base and mobile	19
450-470	Fixed, base, or mobile	7, 21
453.0375	Mobile	23
453.050	Base or mobile	8
453.05625	do	8, 20
453.06250	do	8, 18
453.06875	do	8, 20
453.0875	Mobile	23
453.100	Base or mobile	8
453.10625	do	8, 20
453.11250	do	8, 18
453.11875	do	8, 20
453.1375	Mobile	23
453.150	Base or mobile	8
453.15625	do	8, 20
453.16250	do	8, 18
453.16875	do	8, 20
453.1875	Mobile	23
453.200	Base or mobile	8
453.20625	do	8, 20
453.21250	do	8, 18
453.21875	do	8, 20
453.2375	Mobile	23
453.250	Base or mobile	8
453.25625	do	8, 20
453.26250	do	8, 18
453.26875	do	8, 20
453.2875	Mobile	23
453.300	Base or mobile	8
453.30625	do	8, 20
453.31250	do	8, 18
453.31875	do	8, 20
453.3375	Mobile	23
453.350	Base or mobile	8
453.35625	do	8, 20
453.36250	do	8, 18
453.36875	do	8, 20
453.3875	Mobile	23
453.400	Base or mobile	8
453.40625	do	8, 20
453.41250	do	8, 18
453.41875	do	8, 20
453.4375	Mobile	23
453.450	Base or mobile	8
453.45625	do	8, 20
453.46250	do	8, 18
453.46875	do	8, 20
453.4875	Mobile	23
453.500	Base or mobile	8
453.50625	do	8, 20
453.51250	do	8, 18
453.51875	do	8, 20
453.5375	Mobile	23
453.550	Base or mobile	8
453.55625	do	8, 20
453.56250	do	8, 18
453.56875	do	8, 20
453.5875	Mobile	23
453.600	Base or mobile	8
453.60625	do	8, 20
453.61250	do	8, 18
453.61875	do	8, 20
453.6375	Mobile	23
453.650	Base or mobile	8
453.65625	do	8, 20
453.66250	do	8, 18
453.66875	do	8, 20
453.6875	Mobile	23
453.700	Base or mobile	9
453.70625	do	9, 20
453.71250	do	9, 18
453.71875	do	9, 20
453.7375	Mobile	23
453.750	Base or mobile	8
453.75625	do	8, 20
453.76250	do	8, 18
453.76875	do	8, 20
453.7875	Mobile	23
453.800	Base or mobile	8
453.80625	do	8, 20
453.81250	do	8, 18
453.81875	do	8, 20
453.8375	Mobile	23
453.850	Base or mobile	8
453.85625	do	8, 20
453.86250	do	8, 18
453.86875	do	8, 20
453.8875	Mobile	23
453.900	Base or mobile	8
453.90625	do	8, 20
453.91250	do	8, 18
453.91875	do	8, 20
453.9375	Mobile	23
453.950	Base or mobile	8
453.95625	do	8, 20
453.96250	do	8, 18
453.96875	do	8, 20
458.0375	Mobile	23
458.050	do	8
458.05625	do	8, 20
458.06250	do	8, 18
458.06875	do	8, 20
458.0875	do	23
458.100	do	8
458.10625	do	8, 20
458.11250	do	8, 18
458.11875	do	8, 20
458.1375	do	23
458.150	do	8
458.15625	do	8, 20
458.16250	do	8, 18
458.16875	do	8, 20
458.1875	do	23
458.200	do	8
458.20625	do	8, 20
458.21250	do	8, 18

Frequency or band	Class of station(s)	Limitations
458.21875	do	8, 20
458.2375	do	23
458.250	do	8
458.25625	do	8, 20
458.26250	do	8, 18
458.26875	do	8, 20
458.2875	do	23
458.300	do	8
458.30625	do	8, 20
458.31250	do	8, 18
458.31875	do	8, 20
458.3375	do	23
458.350	do	8
458.35625	do	8, 20
458.36250	do	8, 18
458.36875	do	8, 20
458.3875	do	23
458.400	do	8
458.40625	do	8, 20
458.41250	do	8, 18
458.41875	do	8, 20
458.4375	do	23
458.450	do	8
458.45625	do	8, 20
458.46250	do	8, 18
458.46875	do	8, 20
458.4875	do	23
458.500	do	8
458.50625	do	8, 20
458.51250	do	8, 18
458.51875	do	8, 20
458.5375	do	23
458.550	do	8
458.55625	do	8, 20
458.56250	do	8, 18
458.56875	do	8, 20
458.5875	do	23
458.600	do	8
458.60625	do	8, 20
458.61250	do	8, 18
458.61875	do	8, 20
458.6375	do	23
458.650	do	8
458.65625	do	8, 20
458.66250	do	8, 18
458.66875	do	8, 20
458.6875	do	23
458.700	do	8
458.70625	do	8, 20
458.71250	do	8, 18
458.71875	do	8, 20
458.7375	do	23
458.750	do	8
458.75625	do	8, 20
458.76250	do	8, 18
458.76875	do	8, 20
458.7875	do	23
458.800	do	8
458.80625	do	8, 20
458.81250	do	8, 18
458.81875	do	8, 20
458.8375	do	23
458.850	do	8
458.85625	do	8, 20
458.86250	do	8, 18
458.86875	do	8, 20
458.8875	do	23
458.900	do	8
458.90625	do	8, 20
458.91250	do	8, 18
458.91875	do	8, 20
458.9375	do	23
458.950	do	8
458.95625	do	8, 20
458.96250	do	8, 18
458.96875	do	8, 20
470-512	Base or mobile	9
806-824	Mobile	10
851-869	Base or mobile	10
928 and above	Operational-fixed	11
929-930	Base only	16
1427-1435	Operational fixed, base or mobile	12
2450-2500	Base or mobile	13
10,550 to 10,680*	do	

*The frequencies in the band 10.55-10.68 GHz are available for Digital Termination Systems and for associated internodal links in the Point-to-Point Microwave Radio Service. No new licenses will be issued under this Subpart but current licenses will be renewed.

(c) * * *

(18) This frequency is not available in the 150-170 MHz band until August 16, 1996. This frequency will be assigned with an authorized bandwidth not to exceed 11.25 kHz. In the 450-470 MHz band, secondary telemetry operations pursuant to § 90.238(e) will be authorized on this frequency.

* * * * *

(20) This frequency is not available until August 16, 1996. After August 16, 1996 this frequency will be assigned with an authorized bandwidth not to exceed 6 kHz.

(21) Assignment of frequencies in this band are subject to the provisions of § 90.173

(22) This frequency will be authorized a channel bandwidth of 25 kHz.

(23) This frequency is available for systems first licensed prior to August 16, 1995. No new systems will be authorized after August 16, 1995, but prior authorized systems may be modified, expanded, and renewed.

* * * * *

(e) * * *

(2) Frequencies in the 25-50 MHz, 150-170 MHz, 450-512 MHz and 902-928 MHz bands may be assigned for the operation of Location and Monitoring Service (LMS) systems in accordance with the provisions of subpart M, notwithstanding this limitation.

* * * * *

6. Section 90.25 is amended by replacing the table of frequencies in paragraph (b), replacing limitation (22), and adding limitations (24), (25), (26), and (27) in paragraph (c), and replacing paragraph (e)(2) to read as follows:

Frequency or band	Class of station(s)	Limitations
42.20	do	2, 12
42.22	do	2, 12
42.24	do	2, 12
42.26	do	2, 12
42.28	do	2, 12
42.30	do	2, 12
42.32	Base or mobile	2, 3, 12
42.34	do	2, 3, 12
42.36	do	2, 3, 12
42.38	do	2, 3, 12
42.40	do	2, 3, 12, 28
42.42	do	2, 3, 12
42.44	do	2, 3, 12
42.46	do	2, 3, 12
42.48	do	2, 3, 12
42.50	do	2, 3, 12
42.52	do	2, 3, 12
42.54	do	2, 3, 12
42.56	do	2, 3, 12
42.58	do	2, 3, 12
42.60	do	2, 3, 12
42.62	do	2, 3, 12
42.64	do	2, 3, 12
42.66	Mobile	2, 12
42.68	do	2, 12
42.70	do	2, 12
42.72	do	2, 12
42.74	do	2, 12
42.76	do	2, 12
42.78	do	2, 12
42.80	Base or mobile	2, 3, 12
42.82	do	2, 3, 12
42.84	do	2, 3, 12
42.86	do	2, 3, 12
42.88	do	2, 3, 12
42.90	do	2, 3, 12
42.92	do	2, 3, 12
42.94	do	2, 3, 12
44.62	do	2, 3, 12
44.66	do	2, 3, 12
44.70	do	2, 3, 12
44.74	do	2, 3, 12
44.78	Mobile	2, 12
44.82	do	2, 12
44.86	do	2, 12
44.90	do	2, 12
44.94	Base or mobile	2, 3, 12
44.98	do	2, 3, 12
45.02	do	2, 3, 12
45.06	do	2, 3, 12
45.10	do	
45.14	do	
45.18	do	
45.22	do	
45.26	Mobile	
45.30	do	
45.34	do	
45.38	do	
45.42	Base or mobile	
45.46	do	
45.50	do	
45.54	do	
45.58	do	
45.62	do	
45.66	do	
45.70	do	
45.74	Mobile	
45.78	do	
45.82	do	
45.86	Base or mobile	11
45.90	do	29
45.94	do	
45.98	do	
46.02	do	
72.00-76.00	Operational fixed	13
150 to 170	Base or mobile	33
154.650	Mobile	
154.6575	do	26
154.665	Base or mobile	12
154.6725	do	12, 26
154.680	do	12
154.6875	do	12, 26
154.695	do	12
154.7025	do	12, 26
154.710	Mobile	
154.7175	do	26
154.725	Base or mobile	
154.7325	do	26
154.740	do	
154.7475	do	26
154.755	do	
154.7625	do	26
154.770	Mobile	
154.7775	do	26
154.785	Base or mobile	
154.7925	do	26
154.800	do	
154.8075	do	26
154.815	do	
154.8225	do	26
154.830	Mobile	
154.8375	do	26
154.845	Base or mobile	
154.8525	do	26
154.860	do	
154.8675	do	26
154.875	do	
154.8825	do	26
154.890	Mobile	
154.8975	do	26
154.905	Base of mobile	12
154.9125	do	12, 26
154.920	do	12
154.9275	do	12, 26
154.935	do	12
154.9425	do	12, 26
154.950	Mobile	
154.9575	do	26
155.01	Base or mobile	
155.0175	do	26

Frequency or band	Class of station(s)	Limitations
155.07	do	
155.0775	do	26
155.13	do	
155.1375	do	26
155.19	do	
155.1975	do	26
155.25	do	
155.2575	do	26
155.31	do	
155.3175	do	26
155.370	do	
155.3775	do	26
155.415	do	
155.4225	do	26
155.430	do	
155.4375	do	26
155.445	do	12
155.4525	do	12, 26
155.460	do	12
155.4675	do	12, 26
155.475	do	14
155.4825	do	14, 26
155.490	do	
155.4975	do	26
155.505	do	12
155.5125	do	12, 26
155.520	do	
155.5275	do	26
155.535	do	
155.5425	do	26
155.550	do	
155.5575	do	26
155.565	do	
155.5725	do	26
155.580	do	
155.5875	do	26
155.595	do	
155.6025	do	26
155.610	do	
155.6175	do	26
155.625	do	
155.6325	do	26
155.640	do	
155.6475	do	26
155.655	do	
155.6625	do	26
155.670	do	
155.6775	do	26
155.685	do	
155.6925	do	26
155.700	do	
155.7075	do	26
155.730	do	
155.7375	do	26
155.79	do	
155.7975	do	26
155.85	Mobile	
155.8575	do	26
155.91	do	
155.9175	do	26
155.97	do	
155.9775	do	26
156.03	do	
156.0375	do	26
156.09	do	
156.0975	do	26
156.15	do	
156.1575	do	26
156.210	Base or mobile	
156.2175	do	26
158.7225	do	32
158.730	do	
158.7375	do	26
158.790	do	
158.7975	do	26
158.850	do	
158.8575	do	26
158.910	Mobile	
158.9175	do	26
158.970	do	
158.9775	do	26
159.030	do	
159.0375	do	26
159.090	Base or mobile	
159.0975	do	26
159.150	do	
159.1575	do	26
159.210	do	
159.2175	do	26
169-172	Mobile	30
173.075	Base or mobile	31
220-222	Base and mobile	4
450-470	Fixed, base, or mobile	15, 33
453.0375	Mobile	34
453.050	Base or mobile	16
453.05625	do	16, 32
453.06250	do	16, 26
453.06875	do	16, 32
453.0875	Mobile	34
453.100	Base or mobile	16
453.10625	do	16, 32
453.11250	do	16, 26
453.11875	do	16, 32
453.1375	Mobile	34
453.150	Base or mobile	16
453.15625	do	16, 32
453.16250	do	16, 26
453.16875	do	16, 32
453.1875	Mobile	34
453.200	Base or mobile	16
453.20625	do	16, 32
453.21250	do	16, 26
453.21875	do	16, 32
453.2375	Mobile	34
453.250	Base or mobile	16
453.25625	do	16, 32
453.26250	do	16, 26
453.26875	do	16, 32
453.2875	Mobile	34
453.300	Base or mobile	16

Frequency or band	Class of station(s)	Limitations
453.30625	do	16, 32
453.31250	do	16, 26
453.31875	do	16, 32
453.3375	Mobile	34
453.350	Base or mobile	16
453.35625	do	16, 32
453.36250	do	16, 26
453.36875	do	16, 32
453.3875	Mobile	34
453.400	Base or mobile	16
453.40625	do	16, 32
453.41250	do	16, 26
453.41875	do	16, 32
453.4375	Mobile	34
453.450	Base or mobile	16
453.45625	do	16, 32
453.46250	do	16, 26
453.46875	do	16, 32
453.4875	Mobile	34
453.500	Base or mobile	16
453.50625	do	16, 32
453.51250	do	16, 26
453.51875	do	16, 32
453.5375	Mobile	34
453.550	Base or mobile	16
453.55625	do	16, 32
453.56250	do	16, 26
453.56875	do	16, 32
453.5875	Mobile	34
453.600	Base or mobile	16
453.60625	do	16, 32
453.61250	do	16, 26
453.61875	do	16, 32
453.6375	Mobile	34
453.650	Base or mobile	16
453.65625	do	16, 32
453.66250	do	16, 26
453.66875	do	16, 32
453.6875	Mobile	34
453.700	Base of mobile	16
453.70625	do	16, 32
453.71250	do	16, 26
453.71875	do	16, 32
453.7375	Mobile	34
453.750	Base or mobile	16
453.75625	do	16, 32
453.76250	do	16, 26
453.76875	do	16, 32
453.7875	Mobile	34
453.800	Base or mobile	16
453.80625	do	16, 32
453.81250	do	16, 26
453.81875	do	16, 32
453.8375	Mobile	34
453.850	Base or mobile	16
453.85625	do	16, 32
453.86250	do	16, 26
453.86875	do	16, 32
453.8875	Mobile	34
453.900	Base or mobile	16
453.90625	do	16, 32
453.91250	do	16, 26
453.91875	do	16, 32
453.9375	Mobile	34
453.950	Base or mobile	16
453.95625	do	16, 32
453.96250	do	16, 26
453.96875	do	16, 32
458.0375	Mobile	34
458.050	do	16
458.05625	do	16, 32
458.06250	do	16, 26
458.06875	do	16, 32
458.0875	do	34
458.100	do	16
458.10625	do	16, 32
458.11250	do	16, 26
458.11875	do	16, 32
458.1375	do	34
458.150	do	16
458.15625	do	16, 32
458.16250	do	16, 26
458.16875	do	16, 32
458.1875	do	34
458.200	do	16
458.20625	do	16, 32
458.21250	do	16, 26
458.21875	do	16, 32
458.2375	do	34
458.250	do	16
458.25625	do	16, 32
458.26250	do	16, 26
458.26875	do	16, 32
458.2875	do	34
458.300	do	16
458.30625	do	16, 32
458.31250	do	16, 26
458.31875	do	16, 32
458.3375	do	34
458.350	do	16
458.35625	do	16, 32
458.36250	do	16, 26
458.36875	do	16, 32
458.3875	do	34
458.400	do	16
458.40625	do	16, 32
458.41250	do	16, 26
458.41875	do	16, 32
458.4375	do	34
458.450	do	16
458.45625	do	16, 32
458.46250	do	16, 26
458.46875	do	16, 32
458.4875	do	34
458.500	do	16
458.50625	do	16, 32
458.51250	do	16, 26
458.51875	do	16, 32
458.5375	do	34
458.550	do	16

§ 90.25 Forestry-Conservation Radio Service.

* * * * *

(b) * * *

Forestry-Conservation Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Kilohertz:		
2212	Base or mobile	1
2226	do	1
2236	do	1
2244	do	1
Megahertz:		
30.86	do	2
30.90	do	2
30.94	do	2
30.98	do	2
31.02	do	2
31.06	do	2, 3, 4
31.10	do	2, 3, 4
31.14	do	2, 3, 4
31.18	do	3, 4
31.22	do	3, 4
31.26	do	3, 4
31.30	do	3, 4
31.34	do	3, 4
31.38	do	3, 4
31.42	do	3, 4
31.46	do	3, 4
31.50	do	3, 4
31.54	do	3, 4
31.58	do	3, 4
31.62	do	3, 4
31.66	do	3, 4
31.70	do	3, 4
31.74	do	3, 4
31.78	do	3, 4
31.82	do	3, 4
31.86	do	3, 4
31.90	do	3, 4
31.94	do	3, 4
31.98	do	3, 4
44.64	do	
44.68	do	
44.72	do	
44.76	do	
44.80	do	
44.84	do	
44.88	do	
44.92	do	
44.96	do	
45.00	do	
45.04	do	
72.00 to 76.00	Operational fixed	5
150 to 170	Base or mobile	25
151.145	do	6
151.1525	do	6, 22
151.160	do	6
151.1675	do	6, 22
151.175	do	6
151.190	do	6, 26
151.205	do	6
151.2125	do	6, 22
151.220	do	6
151.2275	do	6, 22
151.235	do	6
151.2425	do	6, 22
151.250	do	6
151.2575	do	6, 22
151.265	do	6
151.2725	do	6, 22
151.280	do	6
151.2875	do	6, 22
151.295	do	6
151.310	do	6, 26
151.325	do	6
151.3325	do	6, 22
151.340	do	6
151.3475	do	6, 22
151.355	do	6
151.3625	do	6, 22
151.370	do	6
151.3775	do	6, 22
151.385	do	6
151.3925	do	6, 22
151.400	do	6
151.4075	do	6, 22
151.415	do	6
151.4225	do	6, 22
151.430	do	6
151.4375	do	6, 22
151.445	do	6
151.4525	do	6, 22
151.460	do	6
151.4675	do	6, 22
151.475	do	6
151.4825	do	6, 22
151.490	do	6, 7
151.4975	do	6, 7, 22
159.225	do	
159.2325	do	22
159.240	do	8
159.2475	do	8, 22
159.255	do	8
159.2625	do	8, 22

Frequency or band	Class of station(s)	Limitations
159.270	do	8
159.2775	do	8, 22
159.285	do	8
159.2925	do	8, 22
159.300	do	8
159.3075	do	8, 22
159.315	do	8
159.3225	do	8, 22
159.330	do	8
159.3375	do	8, 22
159.345	do	8
159.3525	do	8, 22
159.360	do	8
159.3675	do	8, 22
159.375	do	8
159.3825	do	8, 22
159.390	do	8
159.3975	do	8, 22
159.405	do	8
159.4125	do	8, 22
159.420	do	8
159.4275	do	8, 22
159.435	do	8
159.4425	do	8, 22
159.450	do	
159.4575	do	22
159.465	do	
159.4725	do	22
169-172	Mobile	20
170.425	Base or mobile	4, 9, 10
170.475	do	4, 9, 11
170.575	do	4, 9, 10
171.425	do	4, 9, 11
171.475	do	4, 10,12
171.575	do	4, 9, 11
172.225	do	4, 9, 10
172.275	do	4, 11,12
172.375	do	4, 9, 10
220-222	Base and mobile	23
450-470	Fixed, base or mobile	13, 25
453.0375	Mobile	27
453.050	Base or mobile	14
453.05625	do	14, 24
453.06250	do	14, 22
453.06875	do	14, 24
453.0875	Mobile	27
453.100	Base or mobile	14
453.10625	do	14, 24
453.11250	do	14, 22
453.11875	do	14, 24
453.1375	Mobile	27
453.150	Base or mobile	14
453.15625	do	14, 24
453.16250	do	14, 22
453.16875	do	14, 24
453.1875	Mobile	27
453.200	Base or mobile	14
453.20625	do	14, 24
453.21250	do	14, 22
453.21875	do	14, 24
453.2375	Mobile	27
453.250	Base or mobile	14
453.25625	do	14, 24
453.26250	do	14, 22
453.26875	do	14, 24
453.2875	Mobile	27
453.300	Base or mobile	14
453.30625	do	14, 24
453.31250	do	14, 22
453.31875	do	14, 24
453.3375	Mobile	27
453.350	Base or mobile	14
453.35625	do	14, 24
453.36250	do	14, 22
453.36875	do	14, 24
453.3875	Mobile	27
453.400	Base or mobile	14
453.40625	do	14, 24
453.41250	do	14, 22
453.41875	do	14, 24
453.4375	Mobile	27
453.450	Base or mobile	14
453.45625	do	14, 24
453.46250	do	14, 22
453.46875	do	14, 24
453.4875	Mobile	27
453.500	Base or mobile	14
453.50625	do	14, 24
453.51250	do	14, 22
453.51875	do	14, 24
453.5375	Mobile	27
453.550	Base or mobile	14
453.55625	do	14, 24
453.56250	do	14, 22
453.56875	do	14, 24
453.5875	Mobile	27
453.600	Base or mobile	14
453.60625	do	14, 24
453.61250	do	14, 22
453.61875	do	14, 24
453.6375	Mobile	27
453.650	Base or mobile	14
453.65625	do	14, 24
453.66250	do	14, 22
453.66875	do	14, 24
453.6875	Mobile	27
453.700	Base or mobile	14
453.70625	do	14, 24
453.71250	do	14, 22
453.71875	do	14, 24
453.7375	Mobile	27
453.750	Base or mobile	14
453.75625	do	14, 24
453.76250	do	14, 22
453.76875	do	14, 24
453.7875	Mobile	27
453.800	Base or mobile	14
453.80625	do	14, 24
453.81250	do	14, 22
453.81875	do	14, 24

Frequency or band	Class of station(s)	Limitations
453.8375	Mobile	27
453.850	Base or mobile	14
453.85625	do	14, 24
453.86250	do	14, 22
453.86875	do	14, 24
453.8875	Mobile	27
453.900	Base or mobile	14
453.90625	do	14, 24
453.91250	do	14, 22
453.91875	do	14, 24
453.9375	Mobile	27
453.950	Base of mobile	14
453.95625	do	14, 24
453.96250	do	14, 22
453.96875	do	14, 24
458.0375	Mobile	27
458.050	do	14
458.05625	do	14, 24
458.06250	do	14, 22
458.06875	do	14, 24
458.0875	do	27
458.100	do	14
458.10625	do	14, 24
458.11250	do	14, 22
458.11875	do	14, 24
458.1375	do	27
458.150	do	14
458.15625	do	14, 24
458.16250	do	14, 22
458.16875	do	14, 24
458.1875	do	27
458.200	do	14
458.20625	do	14, 24
458.21250	do	14, 22
458.21875	do	14, 24
458.2375	do	27
458.250	do	14
458.25625	do	14, 24
458.26250	do	14, 22
458.26875	do	14, 24
458.2875	do	27
458.300	do	14
458.30625	do	14, 24
458.31250	do	14, 22
458.31875	do	14, 24
458.3375	do	27
458.350	do	14
458.35625	do	14, 24
458.36250	do	14, 22
458.36875	do	14, 24
458.3875	do	27
458.400	do	14
458.40625	do	14, 24
458.41250	do	14, 22
458.41875	do	14, 24
458.4375	do	27
458.450	do	14
458.45625	do	14, 24
458.46250	do	14, 22
458.46875	do	14, 24
458.4875	do	27
458.500	do	14
458.50625	do	14, 24
458.51250	do	14, 22
458.51875	do	14, 24
458.5375	do	27
458.550	do	14
458.55625	do	14, 24
458.56250	do	14, 22
458.56875	do	14, 24
458.5875	do	27
458.600	do	14
458.60625	do	14, 24
458.61250	do	14, 22
458.61875	do	14, 24
458.6375	do	27
458.650	do	14
458.65625	do	14, 24
458.66250	do	14, 22
458.66875	do	14, 24
458.6875	do	27
458.700	do	14
458.70625	do	14, 24
458.71250	do	14, 22
458.71875	do	14, 24
458.7375	do	27
458.750	do	14
458.75625	do	14, 24
458.76250	do	14, 22
458.76875	do	14, 24
458.7875	do	27
458.800	do	14
458.80625	do	14, 24
458.81250	do	14, 22
458.81875	do	14, 24
458.8375	do	27
458.850	do	14
458.85625	do	14, 24
458.86250	do	14, 22
458.86875	do	14, 24
458.8875	do	27
458.900	do	14
458.90625	do	14, 24
458.91250	do	14, 22
458.91875	do	14, 24
458.9375	do	27
458.950	do	14
458.95625	do	14, 24
458.96250	do	14, 22
458.96875	do	14, 24
470 to 512	Base or mobile	15
806 to 824	Mobile	16
851 to 869	Base or Mobile	16
928 and above	Operational-fixed	17
929 to 930	Base only	21
1427 to 1435	Operational fixed, base or mobile	18
2450 to 2500	Base or mobile	19
10,550 to 10,680*	do	

*The frequencies in the band 10.55-10.68 GHz are available for Digital Termination Systems and for associated internodal links in the Point-to-Point Microwave Radio Service. No new licenses will be issued under this Subpart but current licenses will be renewed.

(c) * * *

(22) This frequency is not available in the 150-170 MHz band until August 16, 1996. This frequency will be assigned with an authorized bandwidth not to exceed 11.25 kHz. In the 450-470 MHz band, secondary telemetry operations pursuant to § 90.238(e) will be authorized on this frequency.

* * * * *

(24) This frequency is not available until August 16, 1996. After August 16, 1996 this frequency will be assigned with an authorized bandwidth not to exceed 6 kHz.

(25) Assignment of frequencies in this band are subject to the provisions of § 90.173

(26) This frequency will be authorized a channel bandwidth of 25 kHz.

(27) This frequency is available for systems first licensed prior to August 16, 1995. No new systems will be authorized after August 16, 1995, but prior authorized systems may be modified, expanded, and renewed.

* * * * *

(e) * * *

(2) Frequencies in the 25-50 MHz, 150-170 MHz, 450-512 MHz and 902-928 MHz bands may be assigned for the operation of Location and Monitoring Service (LMS) systems in accordance with the provisions of subpart M, notwithstanding this limitation.

* * * * *

7. Section 90.27 is amended by replacing the table of frequencies in paragraph (b), replacing limitation (2), revising limitations (11), (12), and (13), and adding limitations (27) and (28) in paragraph (c) to read as follows:

§ 90.27 Emergency Medical Radio Service.

* * * * *

(b) * * *

Emergency Medical Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Megahertz:		
72.00 to 76.00	Operational-fixed	1
150 to 170	Base or mobile	28
150.775	Mobile	
150.7825	do	2
150.790	do	
150.7975	do	
150.805	do	
155.325	Base or mobile	3, 4
155.3325	do	2, 3, 4
155.340	do	4, 5
155.3475	do	2, 4, 5
155.355	do	3, 4
155.3625	do	2, 3, 4
155.385	do	3, 4
155.3925	do	2, 3, 4
155.400	do	3, 4
155.4075	do	2, 3, 4
169-172	Mobile	6
220.9025	Base	25
220.9075	do	25
220.9125	do	25
220.9175	do	25
220.9225	do	25
221.9025	Mobile	25
221.9075	do	25
221.9125	do	25
221.9175	do	25
221.9225	do	25
450 to 470	Fixed, base, or mobile	7, 28
453.025	Base	9, 19, 22, 26
453.03125	do	9, 19, 22, 26, 27
453.03750	do	2, 9, 19, 22, 26
453.04375	do	9, 19, 22, 26, 27
453.050	Base or mobile	8
453.05625	do	8, 27
453.06250	do	2, 8
453.06875	do	8, 27
453.075	Base	9, 19, 22, 26
453.08125	do	9, 19, 22, 26, 27
453.08750	do	2, 9, 19, 22, 26
453.09375	do	9, 19, 22, 26, 27
453.100	Base or mobile	8
453.10625	do	8, 27
453.11250	do	2, 8
453.11875	do	8, 27
453.125	Base	9, 19, 22, 26
453.13125	do	9, 19, 22, 26, 27
453.13750	do	2, 9, 19, 22, 26
453.14375	do	9, 19, 22, 26, 27
453.150	Base or mobile	8
453.15625	do	8, 27
453.16250	do	2, 8
453.16875	do	8, 27
453.175	Base	9, 19, 22, 26
453.18125	do	9, 19, 22, 26, 27
453.18750	do	2, 9, 19, 22, 26
453.19375	do	9, 19, 22, 26, 27
453.200	Base or mobile	8
453.20625	do	8, 27
453.21250	do	2, 8
453.21875	do	8, 27
453.250	do	8
453.25625	do	8, 27
453.26250	do	2, 8
453.26875	do	8, 27
453.300	do	8
453.30625	do	8, 27
453.31250	do	2, 8
453.31875	do	8, 27
453.350	do	8
453.35625	do	8, 27
453.36250	do	2, 8
453.36875	do	8, 27
453.400	do	8
453.40625	do	8, 27
453.41250	do	2, 8
453.41875	do	8, 27
453.450	do	8
453.45625	do	8, 27
453.46250	do	2, 8
453.46875	do	8, 27
453.500	do	8
453.50625	do	8, 27
453.51250	do	2, 8
453.51875	do	8, 27
453.550	do	8
453.55625	do	8, 27
453.56250	do	2, 8
453.56875	do	8, 27
453.600	do	8
453.60625	do	8, 27
453.61250	do	2, 8
453.61875	do	8, 27
453.650	do	8
453.65625	do	8, 27
453.66250	do	2, 8
453.66875	do	8, 27

Frequency or band	Class of station(s)	Limitations
453.700	do	8
453.70625	do	8, 27
453.71250	do	2, 8
453.71875	do	8, 27
453.750	do	8
453.75625	do	8, 27
453.76250	do	2, 8
453.76875	do	8, 27
453.800	do	8
453.80625	do	8, 27
453.81250	do	2, 8
453.81875	do	8, 27
453.850	do	8
453.85625	do	8, 27
453.86250	do	2, 8
453.86875	do	8, 27
453.900	do	8
453.90625	do	8, 27
453.91250	do	2, 8
453.91875	do	8, 27
453.950	do	8
453.95625	do	8, 27
453.96250	do	2, 8
453.96875	do	8, 27
458.025	Mobile	9, 22, 26
458.03125	do	9, 22, 26, 27
458.03750	do	2, 9, 22, 26
458.04375	do	9, 22, 26, 27
458.050	do	8
458.05625	do	8, 27
458.06250	do	2, 8
458.06875	do	8, 27
458.075	do	9, 22, 26
458.08125	do	9, 22, 26, 27
458.08750	do	2, 9, 22, 26
458.09375	do	9, 22, 26, 27
458.100	do	8
458.10625	do	8, 27
458.11250	do	2, 8
458.11875	do	8, 27
458.125	do	9, 22, 26
458.13125	do	9, 22, 26, 27
458.13750	do	2, 9, 22, 26
458.14375	do	9, 22, 26, 27
458.150	do	8
458.15625	do	8, 27
458.16250	do	2, 8
458.16875	do	8, 27
458.175	do	9, 22, 26
458.18125	do	9, 22, 26, 27
458.18750	do	2, 9, 22, 26
458.19375	do	9, 22, 26, 27
458.200	do	8
458.20625	do	8, 27
458.21250	do	2, 8
458.21875	do	8, 27
458.250	do	8
458.25625	do	8, 27
458.26250	do	2, 8
458.26875	do	8, 27
458.300	do	8
458.30625	do	8, 27
458.31250	do	2, 8
458.31875	do	8, 27
458.350	do	8
458.35625	do	8, 27
458.36250	do	2, 8
458.36875	do	8, 27
458.400	do	8
458.40625	do	8, 27
458.41250	do	2, 8
458.41875	do	8, 27
458.450	do	8
458.45625	do	8, 27
458.46250	do	2, 8
458.46875	do	8, 27
458.500	do	8
458.50625	do	8, 27
458.51250	do	2, 8
458.51875	do	8, 27
458.550	do	8
458.55625	do	8, 27
458.56250	do	2, 8
458.56875	do	8, 27
458.600	do	8
458.60625	do	8, 27
458.61250	do	2, 8
458.61875	do	8, 27
458.650	do	8
458.65625	do	8, 27
458.66250	do	2, 8
458.66875	do	8, 27
458.700	do	8
458.70625	do	8, 27
458.71250	do	2, 8
458.71875	do	8, 27
458.750	do	8
458.75625	do	8, 27
458.76250	do	2, 8
458.76875	do	8, 27
458.800	do	8
458.80625	do	8, 27
458.81250	do	2, 8
458.81875	do	8, 27
458.850	do	8
458.85625	do	8, 27
458.86250	do	2, 8
458.86875	do	8, 27
458.900	do	8
458.90625	do	8, 27
458.91250	do	2, 8
458.91875	do	8, 27
458.950	do	8
458.95625	do	8, 27
458.96250	do	2, 8
458.96875	do	8, 27
460.525	Base or Mobile	10
460.53125	do	10, 27
460.53750	do	2, 10
460.54375	do	10, 27

Frequency or band	Class of station(s)	Limitations
460.550	do	10
460.55625	do	10, 27
460.56250	do	2, 10
460.56875	do	10, 27
462.950	do	3, 11
462.95625	do	3, 11, 27
462.96250	do	2, 3, 11
462.96875	do	3, 11, 27
462.975	do	3, 11
462.98125	do	3, 11, 27
462.98750	do	2, 3, 11
462.99375	do	3, 11, 27
463.000	do	9, 13, 20
463.00625	do	9, 13, 20, 27
463.01250	do	2, 9, 13, 20
463.01875	do	9, 13, 20, 27
463.025	do	9, 13, 20
463.03125	do	9, 13, 20, 27
463.03750	do	2, 9, 13, 20
463.04375	do	9, 13, 20, 27
463.050	do	9, 13, 20
463.05625	do	9, 13, 20, 27
463.06250	do	2, 9, 13, 20
463.06875	do	9, 13, 20, 27
463.075	do	9 ,13, 21
463.08125	do	9, 13, 21, 27
463.08750	do	2, 9, 13, 21
463.09375	do	9, 13, 21, 27
463.100	do	9, 13, 21
463.10625	do	9, 13, 21, 27
463.11250	do	2, 9, 13, 21
463.11875	do	9, 13, 21, 27
463.125	do	9, 13, 21
463.13125	do	9, 13, 21, 27
463.13750	do	2, 9, 13, 21
463.14375	do	9, 13, 21, 27
463.150	do	9, 13, 21
463.15625	do	9, 13, 21, 27
463.16250	do	2, 9, 13, 21
463.16875	do	9, 13, 21, 27
463.175	do	9, 13, 21
463.18125	do	9, 13, 21, 27
463.18750	do	2, 9, 13, 21
463.19375	do	9, 13, 21, 27
465.525	Mobile	10
465.53125	do	10, 27
465.53750	do	2, 10
465.54375	do	10, 27
465.550	do	10
465.55625	do	10, 27
465.56250	do	2, 10
465.56875	do	10, 27
467.950	do	3, 11
467.95625	do	3, 11, 27
467.96250	do	2, 3, 11
467.96875	do	3, 11, 27
467.975	do	3, 11
467.98125	do	3, 11, 27
467.98750	do	2, 3, 11
467.99375	do	3, 11, 27
468.000	do	9, 13, 20
468.00625	do	9, 13, 20, 27
468.01250	do	2, 9, 13, 20
468.01875	do	9, 13, 20, 27
468.025	do	9, 13, 20
468.03125	do	9, 13, 20, 27
468.03750	do	2, 9, 13, 20
468.04375	do	9, 13, 20, 27
468.050	do	9, 13, 20
468.05625	do	9, 13, 20, 27
468.06250	do	2, 9, 13, 20
468.06875	do	9, 13, 20, 27
468.075	do	9, 13, 21
468.08125	do	9, 13, 21, 27
468.08750	do	2, 9, 13, 21
468.09375	do	9, 13, 21, 27
468.100	do	9, 13, 21
468.10625	do	9, 13, 21, 27
468.11250	do	2, 9, 13, 21
468.11875	do	9, 13, 21, 27
468.125	do	9, 13, 21
468.13125	do	9, 13, 21, 27
468.13750	do	2, 9, 13, 21
468.14375	do	9, 13, 21, 27
468.150	do	9, 13, 21
468.15625	do	9, 13, 21, 27
468.16250	do	2, 9, 13, 21
468.16875	do	9, 13, 21, 27
468.175	do	9, 13, 21
468.18125	do	9, 13, 21, 27
468.18750	do	2, 9, 13, 21
468.19375	do	9, 13, 21, 27
470 to 512	Base or Mobile	14
806 to 824	Mobile	15
851 to 869	Base or Mobile	15
928 and above	Operational-fixed	16
929 to 930	Base only	24
1427 to 1435	Operational-fixed base or mobile	17
2450 to 2500	Base or Mobile	18
10,550 to 10,680	do	23

(c) * * *

(2) This frequency is not available in the 150-170 MHz band until August 16, 1996. This frequency will be assigned with an authorized bandwidth not to exceed 11.25 kHz. In the 450-470 MHz band, secondary telemetry operations pursuant to § 90.238(e) will be authorized on this frequency.

* * * * *

(11) This frequency is primarily authorized for use in the dispatch of medical care vehicles and personnel for the rendition or delivery of medical services. This frequency may also be assigned for intra-system and inter-system mutual assistance purposes. For uniformity in usage these frequency pairs may be referred to by channel name as follows:

Frequencies base and mobile (Megahertz)	Mobile only (MHz)	Channel name
462.950	467.950	MED-9
462.95625	467.95625	
462.9625	467.9625	
462.96875	467.96875	
462.975	467.975	MED-10
462.98125	467.98125	
462.9875	467.9875	
462.99375	467.99375	

(12) [Reserved]

(13) For applications for new radio systems received after August 15, 1974, the thirty-two frequency pairs listed below will be assigned in a block for shared operation under § 90.27(a) subject to the following:

(i) For uniformity in usage, these frequency pairs may be referred to by channel name as follows:

Frequencies base and mobile (Megahertz)	Mobile only (MHz)	Channel name
463.000	468.000	MED-1
463.00625	468.00625	MED-A
463.0125	468.0125	MED-B
463.01875	468.01875	MED-C
463.025	468.025	MED-2
463.03125	468.03125	MED-D
463.0375	468.0375	MED-E
463.04375	468.04375	MED-F
463.050	468.050	MED-3
463.05625	468.05625	MED-G
463.0625	468.0625	MED-H
463.06875	468.06875	MED-I
46.075	46.075	MED-4
463.08125	468.08125	MED-J
463.0875	468.0875	MED-K
463.09375	468.09375	MED-L
463.100	468.100	MED-5
463.10625	468.10625	MED-M
463.1125	468.1125	MED-N
463.11875	468.11875	MED-O
463.125	468.125	MED-6
463.13125	468.13125	MED-P
463.1375	468.1375	MED-Q
463.14375	468.14375	MED-R
463.150	468.150	MED-7

Frequencies base and mobile (Megahertz)	Mobile only (MHz)	Channel name
463.15625	468.15625	MED-S
463.1625	468.1625	MED-T
463.16875	468.16875	MED-U
463.175	468.175	MED-8
463.18125	468.18125	MED-V
463.1875	468.1875	MED-W
463.19375	468.19375	MED-X

(ii) Except as provided in paragraphs (c)(13)(iii) and (iv) of this section, mobile or portable stations must employ equipment that is both wired and equipped to transmit/receive, respectively, on each of these MED frequency pairs with transmitters operated on the 468 MHz frequencies.

(iii) * * *

(iv) * * *

* * * * *

(27) This frequency is not available until August 16, 1996. After August 16, 1996 this frequency will be assigned with an authorized bandwidth not to exceed 6 kHz.

(28) Assignment of frequencies in this band are subject to the provisions of § 90.173

* * * * *

8. Section 90.53 is amended by replacing the table of frequencies in paragraph (a), replacing limitation (30), and adding limitations (35), (36), (37), and (38) in paragraph (b), and replacing paragraph (d)(5) to read as follows:

§ 90.53 Special Emergency Radio Service.

(a) * * *

Special Emergency Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Kilohertz:		
2000-3000	Fixed	
2726	Base or mobile	2
3201	do	
Megahertz:		
33.02	do	3, 25
33.04	do	25
33.06	do	3, 25
33.08	do	25
33.10	do	3, 25
35.02	Mobile	27
35.64	Base	4
35.68	do	4
37.90	Base or mobile	3, 25
37.94	do	3, 25
37.98	do	3, 25
43.64	Base	4, 28
43.68	do	4
45.92	Base or mobile	25
45.96	do	25
46.00	do	25
46.04	do	25
47.42	do	5, 25
47.46	do	25
47.50	do	25
47.54	do	25
47.58	do	25
47.62	do	25
47.66	do	25
72.00 to 76.00	Operational-fixed	6
150 to 170	Base or mobile	36
152.0075	Base	4, 31, 37
155.160	Base or mobile	25
155.1675	do	25, 30
155.175	do	25
155.1825	do	25, 30
155.205	do	25
155.2125	do	25, 30
155.220	do	25
155.2275	do	25, 30
155.235	do	25
155.2425	do	25, 30
155.265	do	25
155.2725	do	25, 30
155.280	do	25
155.2875	do	25, 30
155.295	do	25
155.3025	do	25, 30
157.450	do	4, 11, 37
163.250	do	4, 37
169-172	Mobile	33
450-470	Fixed, base, or mobile	12, 36
453.0125	Mobile	38
453.025	Base	26
453.03125	do	26, 35
453.03750	do	26, 30
453.04375	do	26, 35
453.075	do	26
453.08125	do	26, 35
453.08750	do	26, 30
453.09375	do	26, 35
453.125	do	26
453.13125	do	26, 35
453.13750	do	26, 30
453.14375	do	26, 35
453.175	do	26
453.18125	do	26, 35
453.18750	do	26, 30
453.19375	do	26, 35
458.0375	Mobile	38
458.0625	do	38
458.0875	do	38
458.1125	do	38
458.1375	do	38
458.1625	do	38
458.1875	do	38
460.5125	do	38
460.5375	do	38
460.5625	do	38
462.9375	do	38
462.9625	do	38
462.9875	do	38
462.0125	do	38
462.0375	do	38
462.0625	do	38
462.0875	do	38
462.1125	do	38
462.1375	do	38
462.1625	do	38
462.1775	do	38
465.5125	do	38
465.5375	do	38
465.5625	do	38
467.9375	do	38

Frequency or band	Class of station(s)	Limitations
467.9625	do	38
467.9875	do	38
467.0125	do	38
467.0375	do	38
467.0625	do	38
467.0875	do	38
467.1125	do	38
467.1375	do	38
467.1625	do	38
467.1875	do	38
806 to 824	Mobile	21
851 to 869	Base or mobile	21
928 and above	Operational-fixed	22
929 to 930	Base only	7
1427 to 1435	Operational-fixed, base or mobile	23
2450 to 2500	Base or mobile	24
10,550 to 10,680	do	9

(b) * * *

(30) This frequency is not available in the 150-170 MHz band until August 16, 1996. This frequency will be assigned with an authorized bandwidth not to exceed 11.25 kHz. In the 450-470 MHz band, secondary telemetry operations pursuant to § 90.238(e) will be authorized on this frequency.

* * * * *

(35) This frequency is not available until August 16, 1996. After August 16, 1996 this frequency will be assigned with an authorized bandwidth not to exceed 6 kHz.

(36) Assignment of frequencies in this band are subject to the provisions of § 90.173

(37) This frequency will be authorized a channel bandwidth of 25 kHz.

(38) This frequency is available for systems first licensed prior to August 16, 1995. No new systems will be authorized after August 16, 1995, but prior authorized systems may be modified, expanded, and renewed.

* * * * *

(d) * * *

(5) Frequencies in the 25-50 MHz, 150-170 MHz, 450-512 MHz and 902-928 MHz bands may be assigned for the operation of Location and Monitoring Service (LMS) systems in accordance with the provisions of subpart M, notwithstanding this limitation.

* * * * *

9. Section 90.63 is amended by replacing the table of frequencies in paragraph (c), replacing limitation (24), and adding limitations (28), (29) and (30) in paragraph (d), and replacing paragraph (f)(3) to read as follows:

§ 90.63 Power Radio Service.

* * * * *

(c) * * *

Power Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Kilohertz:		
2000 to 25,000	Fixed, base or mobile	1
2292	Base or mobile	1
2398	do	1
4637.5	do	1
Megahertz:		
37.46	do	
37.48	do	
37.50	do	
37.52	do	
37.54	do	
37.56	do	
37.58	do	
37.60	Base, mobile or operational fixed	2
37.62	Base or mobile	
37.64	do	
37.66	do	
37.68	do	
37.70	do	
37.72	do	
37.74	do	
37.76	do	
37.78	do	
37.80	do	
37.82	do	
37.84	Operational fixed, base or mobile	2
37.86	Base or mobile	
47.70	do	
47.72	do	
47.74	do	
47.76	do	
47.78	do	
47.80	do	
47.82	do	
47.84	do	
47.86	do	
47.88	do	
47.90	do	
47.92	do	
47.94	do	
47.96	do	
47.98	do	
48.00	do	
48.02	do	
48.04	do	
48.06	do	
48.08	do	
48.10	do	
48.12	do	
48.14	do	
48.16	do	
48.18	do	
48.20	do	
48.22	do	
48.24	do	
48.26	do	
48.28	do	
48.30	do	
48.32	do	
48.34	do	
48.36	do	
48.38	do	
48.40	do	
48.42	do	
48.44	do	
48.46	do	
48.48	do	
48.50	do	
48.52	do	
48.54	do	
72.00 to 76.00	Operational fixed	3
74.61	Mobile	27
74.63	do	27
74.65	do	27
74.67	do	27
74.69	do	27
74.71	do	27
74.73	do	27

Frequency or band	Class of station(s)	Limitations
74.75	do	27
74.77	do	27
74.79	do	27
75.21	do	27
75.23	do	27
75.25	do	27
75.27	do	27
75.29	do	27
75.31	do	27
75.33	do	27
75.35	do	27
75.37	do	27
75.39	do	27
150 to 170	Base or mobile	29
153.410	do	
153.4175	do	24
153.425	do	4
153.4325	do	4, 24
153.440	do	5
153.4475	do	5, 24
153.455	do	4
153.4625	do	4, 24
153.470	do	
153.4775	do	24
153.485	do	4
153.4925	do	4, 24
153.500	do	5
153.5075	do	5, 24
153.515	do	4
153.5225	do	4, 24
153.530	do	
153.5375	do	24
153.545	do	4
153.5525	do	4, 24
153.560	do	5
153.5675	do	5, 24
153.575	do	4
153.5825	do	4, 24
153.590	do	
153.5975	do	24
153.605	do	4
153.6125	do	4, 24
153.620	do	5
153.6275	do	5, 24
153.635	do	4
153.6425	do	4, 24
153.650	do	
153.6575	do	24
153.665	do	4
153.6725	do	4, 24
153.680	do	5
153.6875	do	5, 24
153.695	do	
153.7025	do	24
153.710	do	
153.7175	do	24
153.725	do	
153.7325	do	24
154.45625	Fixed or mobile	7, 21, 22, 23
154.46375	do	6, 7, 21
154.47125	do	7, 11, 21, 22
154.47875	do	7, 21, 22, 23
158.1225	Base or mobile	28
158.130	do	
158.1375	do	24
158.145	do	8
158.1525	do	8, 24
158.160	do	9
158.1675	do	9, 24
158.175	do	8
158.1825	do	8, 24
158.190	do	
158.1975	do	24
158.205	do	8, 24
158.2125	do	8
158.220	do	9, 24
158.2275	do	9
158.235	do	8, 24
158.2425	do	8
158.250	do	
158.2575	do	24
158.265	do	8
158.2725	do	8, 24
169-172	Mobile, operational fixed	10
173.20375	Fixed or mobile	7, 11, 21, 22
173.2100	do	11, 12, 21, 22
173.2375	do	7, 21, 22, 23
173.250	Base or mobile	9
173.2625	Fixed or mobile	7, 21, 22, 23
173.2875	do	7, 21, 22, 23
173.300	Base or mobile	9
173.3125	Fixed or mobile	7, 21, 22, 23
173.3375	do	7, 21, 22, 23
173.350	Base or mobile	9
173.3625	Fixed or mobile	7, 21, 22, 23
173.3900	do	11, 12, 21, 22
173.39625	do	7, 11, 21, 22
216-220	Base and Mobile	13
220-222	Base and mobile	26
406-413	Operational fixed	10
450-470	Fixed, base, or mobile	14, 29
451.01875	Base or mobile	28
451.025	do	
451.03125	do	28
451.03750	do	24
451.04375	do	28
451.050	do	
451.05625	do	28
451.06250	do	24
451.06875	do	28
451.075	do	
451.08125	do	28
451.08750	do	24
451.09375	do	28
451.100	do	
451.10625	do	28
451.11250	do	24
451.11875	do	28
451.125	do	
451.13125	do	28

Frequency or band	Class of station(s)	Limitations
451.13750	do	24
451.14375	do	28
451.150	do	
451.15625	do	28
451.16250	do	24
451.16875	do	28
451.175	do	15
451.18125	do	15, 28
451.18750	do	15, 24
451.19375	do	15, 28
451.200	do	
451.20625	do	28
451.21250	do	24
451.21875	do	28
451.225	do	15
451.23125	do	15, 28
451.23750	do	15, 24
451.24375	do	15, 28
451.250	do	
451.25625	do	28
451.26250	do	24
451.26875	do	28
451.275	do	15
451.28125	do	15, 28
451.28750	do	15, 24
451.29375	do	15, 28
451.3625	Mobile	30
451.375	Base and Mobile	15
451.38125	do	28
451.38750	do	24
451.39375	do	28
451.4125	Mobile	30
451.425	Base or mobile	15
451.43125	do	15, 28
451.43750	do	15, 24
451.44375	do	15, 28
451.4625	Mobile	30
451.475	Base or mobile	15
451.48125	do	28
451.48750	do	24
451.49375	do	28
451.5125	Mobile	30
451.525	Base or mobile	15
451.53125	do	15, 28
451.53750	do	15, 24
451.54375	do	15, 28
451.5625	Mobile	30
451.575	Base or mobile	15
451.58125	do	15, 28
451.58750	do	15, 24
451.59375	do	15, 28
451.6125	Mobile	30
451.625	Base or mobile	15
451.63125	do	15, 28
451.63750	do	15, 24
451.64375	do	15, 28
451.6625	Mobile	30
451.675	Base or mobile	15
451.68125	do	15, 28
451.68750	do	15, 24
451.69375	do	15, 28
456.01875	do	28
456.025	Mobile	
456.03125	do	28
456.03750	do	24
456.04375	do	28
456.050	do	
456.05625	do	28
456.06250	do	24
456.06875	do	28
456.075	do	
456.08125	do	28
456.08750	do	24
456.09375	do	28
456.100	do	
456.10625	do	28
456.11250	do	24
456.11875	do	28
456.125	do	
456.13125	do	28
456.13750	do	24
456.14375	do	28
456.150	do	
456.15625	do	28
456.16250	do	24
456.16875	do	28
456.175	do	15
456.18125	do	15, 28
456.18750	do	15, 24
456.19375	do	15, 28
456.200	do	
456.20625	do	28
456.21250	do	24
456.21875	do	28
456.225	do	15
456.23125	do	15, 28
456.23750	do	15, 24
456.24375	do	15, 28
456.250	do	
456.25625	do	28
456.26250	do	24
456.26875	do	28
456.275	do	15
456.28125	do	15, 28
456.28750	do	15, 24
456.29375	do	15, 28
456.3625	Mobile	30
456.375	do	15
456.38125	do	15, 28
456.38750	do	15, 24
456.39375	do	15, 28
456.4125	do	30
456.425	do	15
456.43125	do	15, 28
456.43750	do	15, 24
456.44375	do	15, 28
456.4625	do	30
456.475	do	15
456.48125	do	15, 28
456.48750	do	15, 24

Frequency or band	Class of station(s)	Limitations
456.49375	do	15, 28
456.5125	do	30
456.525	do	15
456.53125	do	15, 28
456.53750	do	15, 24
456.54375	do	15, 28
456.5625	do	30
456.575	do	15
456.58125	do	15, 28
456.58750	do	15, 24
456.59375	do	15, 28
456.6125	do	30
456.625	do	15
456.63125	do	15, 28
456.63750	do	15, 24
456.64375	do	15, 28
456.6625	do	30
456.675	do	15
456.68125	do	15, 28
456.68750	do	15, 24
456.69375	do	15, 28
462.4625	do	30
462.475	Base or mobile	15
462.48125	do	15, 28
462.48750	do	15, 24
462.49375	do	15, 28
462.5125	Mobile	30
462.525	Base or mobile	15
462.53125	do	15, 28
467.4625	Mobile	30
467.475	do	15
467.48125	do	15, 28
467.48750	do	15, 24
467.49375	do	15, 28
467.5125	do	30
467.525	do	15
467.53125	do	15, 28
470 to 512	Base or mobile	16
806 to 821	Mobile	17
851 to 866	Base or mobile	17
896 to 901	Mobile	17
928 and above	Operational-fixed	18
929-930	Base only	25
935 to 940	Base or mobile	17
1427 to 1435	Base, mobile or operational fixed	13
2450 to 2500	Base or mobile	19
8400 to 8500	do	20
10,550 to 10,680*	do	

*The frequencies in the band 10.55-10.68 GHz are available for Digital Termination Systems and for associated internodal links in the Point-to-Point Microwave Radio Service. No new licenses will be issued under this Subpart but current licenses will be renewed.

(d) * * *

(24) This frequency is not available in the 150-170 MHz band until August 16, 1996. This frequency will be assigned with an authorized bandwidth not to exceed 11.25 kHz. In the 450-470 MHz band, secondary telemetry operations pursuant to § 90.238(e) will be authorized on this frequency.

* * * * *

(28) This frequency is not available until August 16, 1996. After August 16, 1996 this frequency will be assigned with an authorized bandwidth not to exceed 6 kHz.

(29) Assignment of frequencies in this band are subject to the provisions of § 90.173

(30) This frequency is available for systems first licensed prior to August 16, 1995. No new systems will be authorized after August 16, 1995, but prior authorized systems may be modified, expanded, and renewed.

* * * * *

(f) * * *

(3) Frequencies in the 25-50 MHz, 150-170 MHz, 450-512 MHz and 902-928 MHz bands may be assigned for the operation of Location and Monitoring Service (LMS) systems in accordance with the provisions of subpart M, notwithstanding this limitation.

* * * * *

10. Section 90.65 is amended by replacing the table of frequencies in paragraph (b), replacing limitation (41), and adding limitations (44), (45), and (46) in paragraph (c), and replacing paragraph (e)(4) to read as follows:

§ 90.65 Petroleum Radio Service.

* * * * *

(b) * * *

Petroleum Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Kilohertz:		
1614	Base or mobile	1, 2, 3, 4
1628	do	1, 2, 3, 4
1652	do	1, 2, 3, 4
1676	do	1, 2, 3, 4
1700	do	1, 2, 3, 4
2000 to 25,000	Fixed, base or mobile	1
2292	Base or mobile	1, 2, 4, 5
2398	do	1, 2, 4, 5
4637.5	do	1, 2, 4, 5
Megahertz:		
25.02	do	3, 4
25.04	do	6
25.06	do	3, 4
25.08	do	6, 7
25.10	do	3, 4, 7
25.12	do	
25.14	do	3, 4
25.16	do	
25.18	do	3, 4
25.20	do	
25.22	do	4, 5
25.24	do	
25.26	do	4, 5
25.28	do	
25.30	do	4, 5
25.32	do	
30.66	do	4, 5, 8
30.70	do	4, 5
30.74	do	4, 5, 8
30.78	do	4, 5
30.82	do	4, 5, 8
31.32	do	37
31.40	do	37
31.44	do	37
31.48	do	37
31.52	do	37
31.60	do	37
31.64	do	37
31.72	do	37
31.76	do	37
33.18	do	
33.20	do	
33.22	do	
33.24	do	
33.26	do	
33.28	do	
33.30	do	
33.32	do	
33.34	do	
33.36	do	
33.38	do	
35.48	do	37
36.25	do	9
41.71	do	9
48.56	do	10
48.58	do	10
48.60	do	10
48.62	do	10
48.64	do	10
48.66	do	10
48.68	do	10
48.70	do	10
48.72	do	10
48.74	do	10
48.76	do	10
48.78	do	10
48.80	do	10
48.82	do	10
48.84	do	10
48.86	do	10
48.88	do	10
48.90	do	10
48.92	do	10
48.94	do	10
48.96	do	10
48.98	do	10
49.00	do	10
49.02	do	10
49.04	do	10
49.06	do	10
49.08	do	10
49.10	do	10
49.12	do	10
49.14	do	10
49.16	do	10
49.18	do	10
49.20	do	10
49.22	do	10
49.24	do	10
49.26	do	10
49.28	do	10
49.30	do	10
49.32	do	10
49.34	do	10
49.36	do	10
49.38	do	10
49.40	do	10
49.42	do	10
49.44	do	10

Frequency or band	Class of station(s)	Limitations
49.46	do	10
49.48	do	10
49.50	do	10
72.00 to 76.00	Operational fixed	11
74.61	Mobile	43
74.63	do	43
74.65	do	43
74.67	do	43
74.69	do	43
74.71	do	43
74.73	do	43
74.75	do	43
74.77	do	43
74.79	do	43
75.21	do	43
75.23	do	43
75.25	do	43
75.27	do	43
75.29	do	43
75.31	do	43
75.33	do	43
75.35	do	43
75.37	do	43
75.39	do	43
150 to 170	Base or mobile	45
150.980	do	6
150.9875	do	6, 41
153.035	do	12
153.0425	do	12, 41
153.050	do	4, 5, 13, 38, 40
153.0575	do	4, 5, 13, 38, 40, 41
153.0650	do	4, 5, 13, 38, 40
153.065	do	13
153.0725	do	13, 41
153.080	do	4, 5, 13
153.0875	do	4, 5, 13, 41
153.095	do	13
153.1025	do	13, 41
153.110	do	4, 5, 13
153.1175	do	4, 5, 13, 41
153.125	do	13, 38, 40
153.1325	do	13, 38, 40, 41
153.140	do	4, 5, 13
153.1475	do	4, 5, 13, 41
153.155	do	13
153.1625	do	13, 41
153.170	do	4, 5, 13
153.1775	do	4, 5, 13, 41
153.185	do	13
153.1925	do	13, 41
153.200	do	4, 5, 13
153.2075	do	4, 5, 13, 41
153.215	do	13
153.2225	do	13, 41
153.230	do	4, 5, 13
153.2375	do	4, 5, 13, 41
153.245	do	13
153.2525	do	13, 41
153.260	do	4, 5, 13
153.2675	do	4, 5, 13, 41
153.275	do	13
153.2825	do	13, 41
153.290	do	4, 5, 13
153.2975	do	4, 5, 13, 41
153.305	do	13
153.3125	do	13, 41
153.320	do	4, 5, 13
153.3275	do	4, 5, 13, 41
153.335	do	13, 38
153.3425	do	13, 38, 41
153.350	do	4, 5, 13, 38
153.3575	do	4, 5, 13, 38, 41
153.365	do	13, 38
153.3725	do	13, 38, 41
153.380	do	13, 38
153.3875	do	13, 38, 41
153.395	do	13, 38
153.4025	do	13, 38, 41
153.425	do	14
153.4325	do	14, 41
153.440	do	10, 15
153.4475	do	10, 15, 41
153.455	do	[4
153.4625	do	14, 41
153.485	do	14
153.4925	do	14, 41
153.500	do	10, 15
153.5075	do	10, 15, 41
153.515	do	14
153.5225	do	14, 41
153.545	do	14
153.5525	do	14, 41
153.560	do	10, 15
153.5675	do	10, 15, 41
153.575	do	14
153.5825	do	14, 41
153.605	do	14
153.6125	do	14, 41
153.620	do	10, 15
153.6275	do	10, 15, 41
153.635	do	14
153.6425	do	14, 41
153.665	do	14
153.6725	do	14, 41
153.680	do	10, 15
153.6875	do	10, 15, 41
154.45625	Fixed or mobile	16, 18, 24, 34
154.46375	do	16, 18, 24, 35, 36
154.47125	do	16, 18, 24, 35
154.47875	do	16, 18, 24, 34
154.585	Mobile	6, 19
158.145	Base or mobile	20
158.1525	do	20, 41
158.160	do	10, 21
158.1675	do	10, 21, 41
158.175	do	20
158.1825	do	20, 41
158.205	do	20
158.2125	do	20, 41
158.220	do	10, 21

Frequency or band	Class of station(s)	Limitations
158.2275	do	20, 21, 41
158.235	do	20
158.2425	do	20, 41
158.265	do	20
158.2725	do	20, 41
158.280	do	13
158.2875	do	13, 41
158.295	do	13
158.3025	do	13, 41
158.310	do	4, 5, 13
158.3175	do	4, 5, 13, 41
158.325	do	13, 38, 40
158.3325	do	13, 38, 40, 41
158.355	do	10, 39
158.3625	do	10, 39, 41
158.370	do	4, 5, 10
158.3775	do	4, 5, 10, 41
158.415	do	13, 38, 40
158.4225	do	13, 38, 40, 41
158.430	do	4, 5, 13
158.4375	do	4, 5, 13, 41
158.445	Mobile	6, 22
159.480	Base or mobile	6
159.4875	do	6, 41
169 - 172	Mobile, operational fixed	23
173.20375	Fixed or mobile	16, 18, 24, 35
173.2100	do	16, 24, 25, 35
173.2375	do	16, 18, 24, 34
173.250	Base or mobile	10, 21
173.2625	Fixed or mobile	16, 18, 24, 34
173.2875	do	16, 18, 24, 34
173.300	Base or mobile	10, 21
173.3125	Fixed or mobile	16, 18, 24, 34
173.3375	do	16, 18, 24, 34
173.350	Base or mobile	10, 21
173.3625	Fixed or mobile	16, 18, 24, 34
173.3900	do	16, 24, 25, 35
173.39625	do	16, 18, 24, 35
216-220	Base or mobile	26
220-222	Base and mobile	17
406-413	Operational fixed	23
450-470	Fixed, base, or mobile	27, 45
451.1625	Mobile	46
451.175	Base or mobile	28
451.18125	do	28, 44
451.18750	do	28, 41
451.19375	do	28, 44
451.2125	Mobile	46
451.225	Base or mobile	28
451.23125	do	28, 44
451.23750	do	28, 41
451.24375	do	28, 44
451.2625	Mobile	46
451.275	Base or mobile	28
451.28125	do	28, 44
451.28750	do	28, 41
451.29375	do	28, 44
451.3625	Mobile	46
451.375	Base or mobile	28
451.38125	do	28, 44
451.38750	do	28, 41
451.39375	do	28, 44
451.4125	Mobile	46
451.425	Base or mobile	28
451.43125	do	28, 44
451.43750	do	28, 41
451.44375	do	28, 44
451.4625	Mobile	46
451.475	Base or mobile	28
451.48125	do	28, 44
451.48750	do	28, 41
451.49375	do	28, 44
451.5125	Mobile	46
451.525	Base or mobile	28
451.53125	do	28, 44
451.53750	do	28, 41
451.54375	do	28, 44
451.550	do	4, 5, 10
451.55625	do	4, 5, 10, 44
451.56250	do	4, 5, 10, 41
451.56875	do	4, 5, 10, 44
451.575	do	28
451.58125	do	28, 44
451.58750	do	28, 41
451.59375	do	28, 44
451.600	do	4, 5, 10
451.60625	do	4, 5, 10, 44
451.61250	do	4, 5, 10, 41
451.61875	do	4, 5, 10, 44
451.625	do	28
451.63125	do	28, 44
451.63750	do	28, 41
451.64375	do	28, 44
451.650	do	4, 5, 10
451.65625	do	4, 5, 10, 44
451.66250	do	4, 5, 10, 41
451.66875	do	4, 5, 10, 44
451.675	do	28
451.68125	do	28, 44
451.68750	do	28, 41
451.69375	do	28, 44
451.700	do	4, 5, 10
451.70625	do	4, 5, 10, 44
451.71250	do	4, 5, 10, 41
451.71875	do	4, 5, 10, 44
451.7375	Mobile	46
451.750	Base or mobile	4, 5, 10
451.75625	do	4, 5, 10, 44
451.76250	do	4, 5, 10, 41
451.76875	do	4, 5, 10, 44
454.000	do	6
456.1625	Mobile	46
456.175	do	28
456.18125	do	28, 44
456.18750	do	28, 41
456.19375	do	28, 44
456.2125	do	46
456.225	do	28
456.23125	do	28, 44
456.23750	do	28, 41

Frequency or band	Class of station(s)	Limitations
456.24375	do	28, 44
456.2625	do	46
456.275	do	28
456.28125	do	28, 44
456.28750	do	28, 41
456.29375	do	28, 44
456.3625	do	46
456.375	do	28
456.38125	do	28, 44
456.38750	do	28, 41
456.39375	do	28, 44
456.4125	do	46
456.425	do	28
456.43125	do	28, 44
456.43750	do	28, 41
456.44375	do	28, 44
456.4625	do	46
456.475	do	28
456.48125	do	28, 44
456.48750	do	28, 41
456.49375	do	28, 44
456.5125	do	46
456.525	do	28
456.53125	do	28, 44
456.53750	do	28, 41
456.54375	do	28, 44
456.550	do	10
456.55625	do	10, 44
456.56250	do	10, 41
456.56875	do	10, 44
456.575	do	28
456.58125	do	28, 44
456.58750	do	28, 41
456.59375	do	28, 44
456.600	do	10
456.60625	do	10, 44
456.61250	do	10, 41
456.61875	do	10, 44
456.625	do	28
456.63125	do	28, 44
456.63750	do	28, 41
456.64375	do	28, 44
456.650	do	10
456.65625	do	10, 44
456.66250	do	10, 41
456.66875	do	10, 44
456.675	do	28
456.68125	do	28, 44
456.68750	do	28, 41
456.69375	do	28, 44
456.700	do	10
456.70625	do	10, 44
456.71250	do	10, 41
456.71875	do	10, 44
456.750	do	10
456.75625	do	10, 44
456.76250	do	10, 41
456.76875	do	10, 44
459.000	Base or mobile	6
462.4625	Mobile	46
462.475	Base or mobile	28
462.48125	do	28, 44
462.48750	do	28, 41
462.49375	do	28, 44
456.5125	Mobile	46
462.525	Base or mobile	28
462.53125	do	28, 44
467.4625	Mobile	46
467.475	do	28, 41
467.48125	do	28, 44
467.48750	do	28
467.49375	do	28, 44
467.5125	do	46
467.525	do	28, 41
467.53125	do	28, 44
470 to 512	Base or mobile	29
806-821	Mobile only	30
851-866	Base or mobile	30
896 to 901	Mobile	30
928 and above	Operational-fixed	31
929-930	Base only	42
935 to 940	Base or mobile	30
1427 to 1435	Operational fixed, base or mobile	26
2450 to 2500	Base or mobile	32
8400 to 8500	do	33
10,550 to 10,680*	do	

*The frequencies in the band 10.55-10.68 GHz are available for Digital Termination Systems and for associated intermodal links in the Point-to-Point Microwave Radio Service. No new licenses will be issued under this Subpart but current licenses will be renewed.

(c) * * *

(41) This frequency is not available in the 150-170 MHz band until August 16, 1996. This frequency will be assigned with an authorized bandwidth not to exceed 11.25 kHz. In the 450-470 MHz band, secondary telemetry operations pursuant to § 90.238(e) will be authorized on this frequency.

* * * * *

(44) This frequency is not available until August 16, 1996. After August 16, 1996 this frequency will be assigned with an authorized bandwidth not to exceed 6 kHz.

(45) Assignment of frequencies in this band are subject to the provisions of § 90.173

(46) This frequency is available for systems first licensed prior to August 16, 1995. No new systems will be authorized after August 16, 1995, but prior authorized systems may be modified, expanded, and renewed.

* * * * *

(e) * * *

(4) Frequencies in the 25-50 MHz, 150-170 MHz, 450-512 MHz and 902-928 MHz bands may be assigned for the operation of Location and Monitoring Service (LMS) systems in accordance with the provisions of subpart M, notwithstanding this limitation.

* * * * *

11. Section 90.67 is amended by replacing the table of frequencies in paragraph (b), replacing limitation (36), and adding limitations (38), (39), (40), and (41) in paragraph (c), and replacing paragraph (e)(3) to read as follows:

§ 90.67 Forest Products Radio Service.

* * * * *

(b) * * *

Forest Products Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Kilohertz:		
1676	Base or mobile	1
1700	do	1
2398	do	1
Megahertz:		
29.71	do	
29.73	do	
29.75	do	
29.77	do	
29.79	do	
30.68	do	
30.72	do	
31.48	do	30
31.52	do	30
31.64	do	30
31.72	do	30
31.76	do	30
37.44	do	
37.88	do	
43.02	do	30
43.28	do	30
43.36	do	30
43.40	do	30
43.52	do	30
48.56	do	2
48.58	do	2
48.60	do	2
48.62	do	2
48.64	do	2
48.66	do	2
48.68	do	2
48.70	do	2
48.72	do	2
48.74	do	2
48.76	do	2
48.78	do	2
48.80	do	2
48.82	do	2
48.84	do	2
48.86	do	2
48.88	do	2
48.90	do	2
48.92	do	2
48.94	do	2
48.96	do	2
48.98	do	2
49.00	do	2
49.02	do	2
49.04	do	2
49.06	do	2
49.08	do	2
49.10	do	2
49.12	do	2
49.14	do	2
49.16	do	2
49.18	do	2
49.20	do	2
49.22	do	2
49.24	do	2
49.26	do	2
49.28	do	2
49.30	do	2
49.32	do	2
49.34	do	2
49.36	do	2
49.38	do	2
49.40	do	2
49.42	do	2
49.44	do	2
49.46	do	2
49.48	do	2
49.50	do	2
49.54	do	3
49.58	do	3
72.00 to 76.00	Operational fixed	4
72.44	Mobile	34
72.48	do	34
72.52	do	34
72.56	do	34
72.60	do	34
75.44	do	34
75.48	do	34
75.52	do	34
75.56	do	34
75.60	do	34
150 to 170	Base or mobile	39
152.465	do	29
152.480	do	5, 40
153.050	do	6, 31, 33
153.0575	do	6, 31, 33, 36
153.065	do	6
153.0725	do	6, 36
153.080	do	6
153.0875	do	6, 36
153.095	do	6
153.1025	do	6, 36
153.110	do	6
153.1175	do	6, 36

Frequency or band	Class of station(s)	Limitations
153.125	do	6, 31, 33
153.1325	do	6, 31, 33, 36
153.140	do	6
153.1475	do	6, 36
153.155	do	6
153.1625	do	6, 36
153.170	do	6
153.1775	do	6, 36
153.185	do	6
153.1925	do	6, 36
153.200	do	6
153.2075	do	6, 36
153.215	do	6
153.2225	do	6, 36
153.230	do	6
153.2375	do	6, 36
153.245	do	6
153.2525	do	6, 36
153.260	do	6
153.2675	do	6, 36
153.275	do	6
153.2825	do	6, 36
153.290	do	6
153.2975	do	6, 36
153.305	do	6
153.3125	do	6, 36
153.320	do	6
153.3275	do	6, 36
153.335	do	6, 31
153.3425	do	6, 31, 36
153.350	do	6, 31
153.3575	do	6, 31, 36
153.365	do	6, 31
153.3725	do	6, 31, 36
153.380	do	6, 31
153.3875	do	6, 31, 36
153.395	do	6, 31
153.4025	do	6, 31, 36
153.425	do	7
153.4325	do	7, 36
153.440	do	2,8
153.4475	do	2, 8, 36
153.455	do	7
153.4625	do	7, 36
153.485	do	7
153.4925	do	7, 36
153.500	do	2, 8
153.5075	do	2, 8, 36
153.515	do	7
153.5225	do	7, 36
153.545	do	7
153.5525	do	7, 36
153.560	do	2, 8
153.5675	do	2, 8, 36
153.575	do	7
153.5825	do	7, 36
153.605	do	7
153.6125	do	7, 36
153.620	do	2, 8
153.6275	do	2, 8, 36
153.635	do	7
153.6425	do	7, 36
153.665	do	7
153.6725	do	7, 36
153.680	do	2, 8
153.6875	do	2, 8, 36
154.45625	Fixed or mobile	13, 14, 25, 27
154.46375	do	13, 14, 24, 25, 26
154.47125	do	13, 14, 24, 25
154.47875	do	13, 14, 25, 27
154.570	Mobile	9
154.600	do	9
154.625	Base or mobile	5, 40
154.640	do	5, 36
157.725	do	29
157.740	do	5, 40
158.145	do	10
158.1525	do	10, 36
158.160	do	2, 11
158.1675	do	2, 11, 36
158.175	do	10
158.1825	do	10, 36
158.205	do	10
158.2125	do	10, 36
158.220	do	2, 11
158.2275	do	2, 11, 36
158.235	do	10
158.2425	do	10, 36
158.265	do	10
158.2725	do	10, 36
158.280	do	6
158.2875	do	6, 36
158.295	do	6
158.3025	do	6, 36
158.310	do	6
158.3175	do	6, 36
158.325	do	6, 31, 33
158.3325	do	6, 31, 33, 36
158.355	do	2, 32
158.3625	do	2, 32, 36
158.370	do	2
158.3775	do	2, 36
158.415	do	6, 31, 33
158.4225	do	6, 31, 33, 36
158.430	do	6
158.4375	do	6, 36
158.460	do	5, 40
169-172	Mobile, operational fixed	12
173.20375	Fixed or mobile	13, 14, 24, 25
173.2100	do	13, 15, 24, 25
173.2375	do	13, 14, 25, 27
173.250	Base or mobile	2, 11
173.2625	Fixed or mobile	13, 14, 25, 27
173.2875	do	13, 14, 25, 27
173.300	Base or mobile	2, 11
173.3125	Fixed or mobile	13, 14, 25, 27
173.3375	do	13, 14, 25, 27
173.350	Base or mobile	2, 11
173.3625	Fixed or mobile	13, 14, 25, 27
173.3900	do	13, 15, 24, 25

Frequency or band	Class of station(s)	Limitations
173.39625	do	13, 14, 24, 25
216-220	Base or mobile	16
220-222	Base and mobile	37
406-413	Operational fixed	12
450-470	Fixed, base, or mobile	17, 39
451.1625	Mobile	41
451.175	Base or mobile	18
451.18125	do	18, 38
451.18750	do	18, 36
451.19375	do	18, 38
451.2125	Mobile	41
451.225	Base or mobile	18
451.23125	do	18, 38
451.23750	do	18, 36
451.24375	do	18, 38
451.2625	Mobile	41
451.275	Base or mobile	18
451.28125	do	18, 38
451.28750	do	18, 36
451.29375	do	18, 38
451.3625	Mobile	41
451.375	Base or mobile	18
451.38125	do	18, 38
451.38750	do	18, 36
451.39375	do	18, 38
451.4125	Mobile	41
451.425	Base or mobile	18
451.43125	do	18, 38
451.43750	do	18, 36
451.44375	do	18, 38
451.4625	Mobile	41
451.475	Base or mobile	18
451.48125	do	18, 38
451.48750	do	18, 36
451.49375	do	18, 38
451.5125	Mobile	41
451.525	Base or mobile	18
451.53125	do	18, 38
451.53750	do	18, 36
451.54375	do	18, 38
451.550	do	2
451.55625	do	2, 38
451.56250	do	2, 36
451.56875	do	2, 38
451.575	do	18
451.58125	do	18, 38
451.58750	do	18, 36
451.59375	do	18, 38
451.600	do	2
451.60625	do	2, 38
451.61250	do	2, 36
451.61875	do	2, 38
451.625	do	18
451.63125	do	18, 38
451.63750	do	18, 36
451.64375	do	18, 38
451.650	do	2
451.65625	do	2, 38
451.66250	do	2, 36
451.66875	do	2, 38
451.675	do	18
451.68125	do	18, 38
451.68750	do	18, 36
451.69375	do	18, 38
451.700	do	2
451.70625	do	2, 38
451.71250	do	2, 36
451.71875	do	2, 38
451.7375	Mobile	41
451.750	Base or mobile	2
451.75625	do	2, 38
451.76250	do	2, 36
451.76875	do	2, 38
452.100	do	28
452.10625	do	28, 38
452.11250	do	28, 36
452.11875	do	28, 38
452.200	do	28
452.20625	do	28, 38
452.21250	do	28, 36
452.21875	do	28, 38
452.225	do	28
452.23125	do	28, 38
452.23750	do	28, 36
452.24375	do	28, 38
452.250	do	28
452.25625	do	28, 38
452.26250	do	28, 36
452.26875	do	28, 38
452.275	do	28
452.28125	do	28, 38
452.28750	do	28, 36
452.29375	do	28, 38
452.350	do	28
452.35625	do	28, 38
452.36250	do	28, 36
452.36875	do	28, 38
452.400	do	28
452.40625	do	28, 38
452.41250	do	28, 36
452.41875	do	28, 38
452.450	do	28
452.45625	do	28, 38
452.46250	do	28, 36
452.46875	do	28, 38
456.1625	Mobile	41
456.175	do	18
456.18125	do	18, 38
456.18750	do	18, 36
456.19375	do	18, 38
456.2125	do	41
456.225	do	18
456.23125	do	18, 38
456.23750	do	18, 36
456.24375	do	18, 38
456.2625	do	41
456.275	do	18
456.28125	do	18, 38
456.28750	do	18, 36
456.29375	do	18, 38

Frequency or band	Class of station(s)	Limitations
456.3625	do	41
456.375	do	18
456.38125	do	18, 38
456.38750	do	18, 36
456.39375	do	18, 38
456.4125	do	41
456.425	do	18
456.43125	do	18, 38
456.43750	do	18, 36
456.44375	do	18, 38
456.4625	do	41
456.475	do	18
456.48125	do	18, 38
456.48750	do	18, 36
456.49375	do	18, 38
456.5125	do	41
456.525	do	18
456.53125	do	18, 38
456.53750	do	18, 36
456.54375	do	18, 38
456.550	do	2
456.55625	do	2, 38
456.56250	do	2, 36
456.56875	do	2, 38
456.575	do	18
456.58125	do	18, 38
456.58750	do	18, 36
456.59375	do	18, 38
456.600	do	2
456.60625	do	2, 38
456.61250	do	2, 36
456.61875	do	2, 38
456.625	do	18
456.63125	do	18, 38
456.63750	do	18, 36
456.64375	do	18, 38
456.650	do	2
456.65625	do	2, 38
456.66250	do	2, 36
456.66875	do	2, 38
456.675	do	18
456.68125	do	18, 38
456.68750	do	18, 36
456.69375	do	18, 38
456.700	do	2
456.70625	do	2, 38
456.71250	do	2, 36
456.71875	do	2, 38
456.7375	do	41
456.750	do	2
456.75625	do	2, 38
456.76250	do	2, 36
456.76875	do	2, 38
457.100	do	28
457.10625	do	28, 38
457.11250	do	28, 36
457.11875	do	28, 38
457.200	do	28
457.20625	do	28, 38
457.21250	do	28, 36
457.21875	do	28, 38
457.225	do	28
457.23125	do	28, 38
457.23750	do	28, 36
457.24375	do	28, 38
457.250	do	28
457.25625	do	28, 38
457.26250	do	28, 36
457.26875	do	28, 38
457.275	do	28
457.28125	do	28, 38
457.28750	do	28, 36
457.29375	do	28, 38
457.350	do	28
457.35625	do	28, 38
457.36250	do	28, 36
457.36875	do	28, 38
457.400	do	28
457.40625	do	28, 38
457.41250	do	28, 36
457.41875	do	28, 38
457.450	do	28
457.45625	do	28, 38
457.46250	do	28, 36
457.46875	do	28, 38
462.4625	do	41
462.475	Base or mobile	18
462.48125	do	18, 38
462.48750	do	18, 36
462.49375	do	18, 38
462.5125	do	41
462.525	Base or mobile	18
462.53125	do	18, 38
467.4625	Mobile	41
467.475	do	18
467.48125	do	18, 38
467.48750	do	18, 36
467.49375	do	18, 38
467.5125	do	41
467.525	do	18
467.53125	do	18, 38
470-512	Base or mobile	19
806-821	Mobile only	20
851-866	Base or mobile	20
896-901	Mobile	20
928 and above	Operational-fixed	21
929-930	Base only	35
935-940	Base or mobile	20
1427-1435	Operational fixed, base or mobile	16
2450-2500	Base or mobile	22
8400-8500	do	23
10,550-10,680*	do	

*The frequencies in the band 10.55-10.68 GHz are available for Digital Termination Systems and for associated internodal links in the Point-to-Point Microwave Radio Service. No new licenses will be issued under this Subpart but current licenses will be renewed.

(c) * * *

(36) This frequency is not available in the 150-170 MHz band until August 16, 1996. This frequency will be assigned with an authorized bandwidth not to exceed 11.25 kHz. In the 450-470 MHz band, secondary telemetry operations pursuant to § 90.238(e) will be authorized on this frequency.

* * * * *

(38) This frequency is not available until August 16, 1996. After August 16, 1996 this frequency will be assigned with an authorized bandwidth not to exceed 6 kHz.

(39) Assignment of frequencies in this band are subject to the provisions of § 90.173

(40) This frequency will be authorized a channel bandwidth of 25 kHz.

(41) This frequency is available for systems first licensed prior to August 16, 1995. No new systems will be authorized after August 16, 1995, but prior authorized systems may be modified, expanded, and renewed.

* * * * *

(e) * * *

(3) Frequencies in the 25-50 MHz, 150-170 MHz, 450-512 MHz and 902-928 MHz bands may be assigned for the operation of Location and Monitoring Service (LMS) systems in accordance with the provisions of subpart M, notwithstanding this limitation.

* * * * *

12. Section 90.69 is amended by replacing the table of frequencies in paragraph (b), replacing limitation (12), and adding limitations (14) and (15) in paragraph (c), and replacing paragraph (e)(3) to read as follows:

§ 90.69 Film and Video Production Radio Service.

* * * * *

(b) * * *

Film and Video Production Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Kilohertz:		
1628	Base or mobile	1
1652	do	1
2292	do	1
2398	do	1
4637.5	do	1
Megahertz:		
72 to 76	Operational fixed	2
150 to 170	Base or mobile	15
152.8625	do	3, 14
152.87	do	3
152.8775	do	3, 12
152.90	do	3
152.9075	do	3, 12
152.93	do	3
152.9375	do	3, 12
152.96	do	3
152.9675	do	3, 12
152.99	do	3
152.9975	do	3, 12
153.02	do	3
153.0275	do	3, 12
169-172	Mobile	11
173.225	Base or mobile	4
173.275	do	4
173.325	do	4
173.375	do	4
220-222	Base and mobile	13
806 to 821	Mobile	5
851 to 866	Base or mobile	5
896 to 901	Mobile	5
928 and above	Operational-fixed	6
929-930	Base only	10
935 to 940	Base or mobil	5
1427 to 1435	Base, mobile or operational fixed	7
2450 to 2500	Base or mobile	8
8400 to 8500	do	9
10.550 to 10.680*	do	

*The frequencies in the band 10.55-10.68 GHz are available for Digital Termination Systems and for associated intermodal links in the Point-to-Point Microwave Radio Service. No new licenses will be issued under this subpart but current licenses will be renewed.

(c) * * *

(12) This frequency is not available in the 150-170 MHz band until August 16, 1996. This frequency will be assigned with an authorized bandwidth not to exceed 11.25 kHz. In the 450-470 MHz band, secondary telemetry operations pursuant to § 90.238(e) will be authorized on this frequency.

* * * * *

(14) This frequency is not available until August 16, 1996. After August 16, 1996 this frequency will be assigned with an authorized bandwidth not to exceed 6 kHz.

(15) Assignment of frequencies in this band are subject to the provisions of § 90.173

* * * * *

(e) * * *

(3) Frequencies in the 25-50 MHz, 150-170 MHz, 450-512 MHz and 902-928 MHz bands may be assigned for the operation of Location and Monitoring Service (LMS) systems in accordance with the provisions of subpart M, notwithstanding this limitation.

* * * * *

13. Section 90.71 is amended by replacing the table of frequencies in paragraph (b) and adding limitations (12), (13), (14), and (15) in paragraph (c), and replacing paragraph (e)(3) to read as follows:

§ 90.71 Relay Press Radio Service.

* * * * *

(b) * * *

Relay Press Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Megahertz:		
72.0 to 76.0	Operational fixed	1
169-172	Mobile	8
173.225	Base or mobile	2
173.275	do	2
173.325	do	2
173.375	do	2
220-222	Base and mobile	10
450-470	Fixed or mobile	11, 14
452.9625	Mobile	15
452.975	Fixed or mobile	
452.98125	do	13
452.98750	do	12
452.99375	do	13
453.000	do	
453.00625	do	13
453.01250	do	12
453.01875	do	13
457.9625	Mobile	15
457.975	do	
457.98125	do	13
457.98750	do	12
457.99375	do	13
458.000	do	
458.00625	do	13
458.01250	do	12
458.01875	do	13
806 to 821	do	3
851 to 866	Base or mobile	3
896 to 901	Mobile	3
929-930	Base only	9
928 and above	Operational fixed	4
935 to 940	Base or mobile	3
1427 to 1435	Operational fixed, base or mobile	5
2450 to 2500	Base or mobile	6
8400 to 8500	do	7
10,550 to 10,680*	do	

*The frequencies in the band 10.55-10.68 GHz are available for Digital Termination Systems and for associated internodal links in the Point-to-Point Microwave Radio Service. No new licenses will be issued under this Subpart but current licenses will be renewed.

(c) * * *

(12) This frequency is not available in the 150-170 MHz band until August 16, 1996. This frequency will be assigned with an authorized bandwidth not to exceed 11.25 kHz. In the 450-470 MHz band, secondary telemetry operations pursuant to § 90.238(e) will be authorized on this frequency.

(13) This frequency is not available until August 16, 1996. After August 16, 1996 this frequency will be assigned with an authorized bandwidth not to exceed 6 kHz.

(14) Assignment of frequencies in this band are subject to the provisions of § 90.173

(15) This frequency is available for systems first licensed prior to August 16, 1995. No new systems will be authorized after August 16, 1995, but prior authorized systems may be modified, expanded, and renewed.

* * * * *

(e) * * *

(3) Frequencies in the 25-50 MHz, 150-170 MHz, 450-512 MHz and 902-928 MHz bands may be assigned for the operation of Location and Monitoring Service (LMS) systems in accordance with the provisions of subpart M, notwithstanding this limitation.

* * * * *

14. Section 90.73 is amended by replacing the table of frequencies in paragraph (c), replacing limitation (35) and adding limitations (38), (39), (40), and (41) in paragraph (d), revising paragraph (e)(4), and replacing paragraph (f)(4) to read as follows:

§ 90.73 Special Industrial Radio Service.

* * * * *

(c) * * *

Special Industrial Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Kilohertz:		
2,000 to 25,000	Fixed, base or mobile	1
2292	Base or mobile	1, 34
2398	do	1, 34
4637.5	do	1, 34
Megahertz:		
30.58	do	2
30.60	do	2
30.62	do	2
30.64	do	34
31.28	do	34
31.32	do	29, 34
31.36	do	34
31.40	do	29, 34
31.44	do	29, 34
31.48	do	29, 31, 34
31.52	do	29, 31, 34
31.56	do	34
31.60	do	29, 34
31.64	do	29, 31, 34
31.68	do	34
31.72	do	29, 31, 34
31.76	do	29, 31, 34
31.80	do	34
31.84	do	34
31.88	do	34
31.92	do	34
31.96	do	34
33.12	do	3, 34
35.28	Base or mobile	34
35.32	do	34
35.36	do	34
35.40	do	34
35.44	do	34
35.48	do	29, 34
35.52	do	34
35.74	do	2
35.76	do	2
35.78	do	2
35.80	do	2
35.82	do	2
35.84	do	2
35.86	do	2
43.02	do	31, 34
43.04	do	4
43.06	do	34
43.08	do	34
43.10	do	34
43.12	do	34
43.14	do	34
43.18	do	2
43.28	do	31, 34
43.32	do	34
43.36	do	31, 34
43.40	do	31, 34
43.44	do	34
43.48	do	34
43.52	do	31, 34
47.44	do	2
47.48	do	2
47.52	do	2
47.56	do	2
47.60	do	2
47.64	do	2
47.68	do	2
49.52	do	34
49.54	do	5, 34
49.56	do	2
49.58	do	5, 34
72-76	Operational fixed	6
72.44	Mobile	7
72.48	do	7
72.52	do	7
72.56	do	7
72.60	do	7
75.44	do	7
75.48	do	7
75.52	do	7
75.56	do	7
75.60	do	7
150 to 170	Base or mobile	39
151.490	do	2, 8
151.4975	do	2, 8, 35
151.505	do	4
151.5125	do	4, 35
151.520	do	2
151.5275	do	2, 35
151.535	do	2
151.5425	do	2, 35
151.550	do	2
151.5575	do	2, 35
151.565	do	2
151.5725	do	2, 35
151.580	do	2
151.5875	do	2, 35
151.595	do	2
151.6025	do	2, 35
152.465	do	2, 28, 35

Frequency or band	Class of station(s)	Limitations
152.480	do	2, 9, 35, 40
152.8625	do	10, 34, 38
152.870	do	10, 34
152.8775	do	10, 34, 35
152.885	do	2
152.8925	do	2, 35
152.900	do	2, 10
152.9075	do	2, 10, 35
152.915	do	2
152.9225	do	2, 35
152.930	do	2, 10
152.9375	do	2, 10, 35
152.945	do	2
152.9525	do	2, 35
152.960	do	2, 10
152.9675	do	2, 10, 35
152.975	do	2
152.9825	do	2, 35
152.990	do	2, 10
152.9975	do	2, 10, 35
153.005	do	2
153.0125	do	2, 35
153.020	do	2, 10
153.0275	do	2, 10, 35
153.035	do	2, 11
153.0425	do	2, 11, 35
153.050	do	2, 30, 33
153.0575	do	2, 30, 33, 35
153.125	do	2, 30, 33
153.1325	do	2, 30, 33, 35
153.335	do	2, 30
153.3425	do	2, 30, 35
153.350	do	2, 30
153.3575	do	2, 30, 35
153.365	do	2, 30
153.3725	do	2, 30, 35
153.380	do	2, 30
153.3875	do	2, 30, 35
153.395	do	2, 30
153.4025	do	2, 30, 35
154.45625	Fixed or mobile	12, 13, 15, 25
154.46375	do	12, 13, 15, 26, 27
154.47125	do	12, 13, 15, 27
154.47875	do	12, 13, 15, 25
154.4825	Base or mobile	2, 35
154.490	do	2
154.4975	do	2, 35
154.505	do	2, 35
154.625	do	2, 9, 40
154.640	do	2, 9, 35
157.725	do	2, 28
157.740	do	2, 9, 40
158.325	do	2, 30, 33
158.3325	do	2, 30, 33, 35
158.355	do	2, 32
158.3625	do	2, 32, 35
158.385	do	2
158.3925	do	2, 35
158.400	do	4
158.4075	do	4, 35
158.415	do	2, 30, 33
158.4225	do	2, 30, 33, 35
158.460	do	2, 9, 40
169 to 172	Mobile, operational fixed	14
173.20375	Fixed or mobile	12, 13, 15, 27
173.2100	do	12, 15, 16, 27
173.2375	do	12, 13, 15, 25
173.2625	do	12, 13, 15, 25
173.2875	do	12, 13, 15, 25
173.3125	do	12, 13, 15, 25
173.3375	do	12, 13, 15, 25
173.3625	do	12, 13, 15, 25
173.3900	do	12, 15, 16, 27
173.39625	do	12, 13, 15, 27
216 to 220	Base or mobile	17
220-222	Base and mobile	37
406-413	Operational fixed	14
450 to 470	Fixed, base, or mobile	18, 39
451.7125	Mobile	41
451.725	Base or mobile	2
451.73125	do	2, 38
451.73750	do	2, 35
451.74375	do	2, 38
451.7625	Mobile	41
451.775	Base or mobile	2
451.78125	do	2, 38
451.78750	do	2, 35
451.79375	do	2, 38
451.800	Operational fixed, base or mobile	4, 19
451.80625	do	4, 19, 38
451.81250	do	4, 19, 35
451.81875	do	4, 19, 38
451.825	Base or mobile	2
451.83125	do	2, 38
451.83750	do	2, 35
451.84375	do	2, 38
451.850	do	2
451.85625	do	2, 38
451.86250	do	2, 35
451.86875	do	2, 38
451.875	do	2
451.88125	do	2, 38
451.88750	do	2, 35
451.89375	do	2, 38
451.900	do	2
451.90625	do	2, 38
451.91250	do	2, 35
451.91875	do	2, 38
451.925	do	2
451.93125	do	2, 38
451.93750	do	2, 35
451.94375	do	2, 38
451.950	do	2
451.95625	do	2, 38
451.96250	do	2, 35
451.96875	do	2, 38
451.975	do	2
451.98125	do	2, 38
451.98750	do	2, 35

Frequency or band	Class of station(s)	Limitations
451.99375	do	2, 38
452.000	do	2
452.00625	do	2, 38
452.01250	do	2, 35
452.01875	do	2, 38
452.025	do	2
452.03125	do	2, 38
452.03750	do	2, 35
452.04375	do	2, 38
452.0625	Mobile	41
452.075	Base or mobile	2
452.08125	do	2, 38
452.08750	do	2, 35
452.09375	do	2, 38
452.1125	Mobile	41
452.125	Base or mobile	2
452.13125	do	2, 38
452.13750	do	2, 35
452.14375	do	2, 38
452.1625	Mobile	41
452.175	Base or mobile	2
452.18125	do	2, 38
452.18750	do	2, 35
452.19375	do	2, 38
456.7125	Mobile	41
456.725	do	2
456.73125	do	2, 38
456.73750	do	2, 35
456.74375	do	2, 38
456.7625	do	41
456.775	do	2
456.78125	do	2, 38
456.78750	do	2, 35
456.79375	do	2, 38
456.800	Operational fixed, base or mobile	4, 19
456.80625	do	4,19, 38
456.81250	do	4,19, 35
456.81875	do	4,19, 38
456.825	Mobile	2
456.83125	do	2, 38
456.83750	do	2, 35
456.84375	do	2, 38
456.850	do	2
456.85625	do	2, 38
456.86250	do	2, 35
456.86875	do	2, 38
456.875	do	2
456.88125	do	2, 38
456.88750	do	2, 35
456.89375	do	2, 38
456.900	do	2
456.90625	do	2, 38
456.91250	do	2, 35
456.91875	do	2, 38
456.925	do	2
456.93125	do	2, 38
456.93750	do	2, 35
456.94375	do	2, 38
456.950	do	2
456.95625	do	2, 38
456.96250	do	2, 35
456.96875	do	2, 38
456.975	do	2
456.98125	do	2, 38
456.98750	do	2, 35
456.99375	do	2, 38
457.000	do	2
457.00625	do	2, 38
457.01250	do	2, 35
457.01875	do	2, 38
457.025	do	2
457.03125	do	2, 38
457.03750	do	2, 35
457.04375	do	2, 38
457.0625	do	41
457.075	do	2
457.08125	do	2, 38
457.08750	do	2, 35
457.09375	do	2, 38
457.1125	do	41
457.125	do	2
457.13125	do	2, 38
457.13750	do	2, 35
457.14375	do	2, 38
457.1625	do	41
457.175	do	2
457.18125	do	2, 38
457.18750	do	2, 35
457.19375	do	2, 38
470 to 512	Base or mobile	20
806 to 821	Mobile	21
851 to 866	Base or mobile	21
896 to 901	Mobile	21
928 and above	Operational fixed	22
929-930	Base only	36
935 to 940	Base or mobile	21
1427 to 1435	Operational fixed, base or mobile	17
2450 to 2500	Base or mobile	23
8400 to 8500	do	24
10,550 to 10,680*	do	

*The frequencies in the band 10.55-10.68 GHz are available for Digital Termination Systems and for associated internodal links in the Point-to-Point Microwave Radio Service. No new licenses will be issued under this Subpart but current licenses will be renewed.

(d) * * *

(35) This frequency is not available in the 150-170 MHz band until August 16, 1996. This frequency will be assigned with an authorized bandwidth not to exceed 11.25 kHz. In the 450-470 MHz band, secondary telemetry operations pursuant to § 90.238(e) will be authorized on this frequency.

* * * * *

(38) This frequency is not available until August 16, 1996. After August 16, 1996 this frequency will be assigned with an authorized bandwidth not to exceed 6 kHz.

(39) Assignment of frequencies in this band are subject to the provisions of § 90.173

(40) This frequency will be authorized a channel bandwidth of 25 kHz.

(41) This frequency is available for systems first licensed prior to August 16, 1995. No new systems will be authorized after August 16, 1995, but prior authorized systems may be modified, expanded, and renewed.

* * * * *

(e) * * *

(4) * * *

Base and Mobile	Mobile Only
159.240	160.410
159.2475	160.4175
159.255	160.425
159.2625	160.4325
159.270	160.440
159.2775	160.4475
159.285	160.455
159.2925	160.4625
159.300	160.470
159.3075	160.4775
159.315	160.485
159.3225	160.4925
159.330	160.500
159.3375	160.5075
159.345	160.515
159.3525	160.5225
159.360	160.530
159.3675	160.5375
159.375	160.545
159.3825	160.5525
159.390	160.560
159.3975	160.5675
159.405	160.575
159.4125	160.5825
159.420	160.590
159.4275	160.5975
159.435	160.605
159.4425	160.6125

* * * * *

(f) * * *

(4) Frequencies in the 25-50 MHz, 150-170 MHz, 450-512 MHz and 902-928 MHz bands may be assigned for the operation of Location and Monitoring Service (LMS) systems in accordance with the provisions of subpart M, notwithstanding this limitation.

* * * * *

15. Section 90.75 is amended by replacing the table of frequencies in paragraph (b), revising limitation (23), replacing limitation (24), revising limitation (38), adding limitations (46), (47), (48), (49), (50), and (51) in paragraph (c), revising paragraph (d)(4), and replacing paragraph (e)(4) to read as follows:

§ 90.75 Business Radio Service.

* * * * *

(b) * * *

Business Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Megahertz:		
27.43	Base or Mobile	1, 2
27.45	do	1, 2
27.47	do	1, 2
27.49	do	1, 3
27.51	Mobile	4
27.53	do	4
30.76	Base or mobile	1, 2
30.80	do	1, 2
30.84	Mobile	4, 22
30.88	Base or mobile	1, 2
30.92	do	1, 2
30.96	do	1, 2
31.00	do	1, 2
31.04	do	1, 2
31.16	do	1, 2
31.20	do	1, 2
31.24	do	1, 2
33.14	Mobile	4, 22
33.16	Base or mobile	1, 2
33.40	Mobile	6, 22
35.02	do	4, 5, 22
35.04	Base or mobile	1, 3
35.06	do	1, 2
35.08	do	1, 2
35.10	do	1, 2
35.12	do	1, 2
35.14	do	1, 2
35.18	do	1, 2
35.70	do	2
35.72	do	2
35.88	do	1, 2
35.90	do	1, 2
35.92	do	1, 2
35.94	do	
35.96	do	
35.98	do	
42.96	do	1, 2
42.98	Mobile	4, 22
43.00	Base or mobile	1, 2
72 to 76	Operational fixed	7
74.61	Mobile	45
74.63	do	45
74.65	do	45
74.67	do	45
74.69	do	45
74.71	do	45
74.73	do	45
74.75	do	45
74.77	do	45
74.79	do	45
75.21	do	45
75.23	do	45
75.25	do	45
75.27	do	45
75.29	do	45
75.31	do	45
75.33	do	45
75.35	do	45
75.37	do	45
75.39	do	45
150 to 170	Base or mobile	48
150.815	Mobile	8
150.830	Base	8, 10, 12, 49
150.845	Base or mobile	8
150.8525	do	8, 24
150.860	do	8
150.8675	do	8, 24
150.875	do	8
150.8825	do	8, 24
150.890	do	8
150.8975	do	8, 24
150.905	do	8
150.920	Base	8, 10, 12, 49
150.935	Base or mobile	8
150.9425	do	8, 24
150.950	do	8
150.9575	do	8, 24
150.965	do	8
150.9725	do	8, 24
150.995	do	8
151.0025	do	8, 24
151.010	do	8
151.0175	do	8, 24

Frequency or band	Class of station(s)	Limitations
151.025	do	8
151.0325	do	8, 24
151.040	do	8
151.0475	do	8, 24
151.055	do	8
151.070	Base	8, 10, 12, 49
151.085	Base or mobile	8
151.0925	do	8, 24
151.100	do	8
151.1075	do	8, 24
151.115	do	8
151.1225	do	8, 24
151.130	do	8
151.1375	do	8, 24
151.145	do	8
151.1525	do	8, 24
151.160	do	8
151.1675	do	8, 24
151.175	do	8
151.190	Base	8, 10, 12, 49
151.205	Base or mobile	8
151.2125	do	8, 24
151.220	do	8
151.2275	do	8, 24
151.235	do	8
151.2425	do	8, 24
151.250	do	8
151.2575	do	8, 24
151.265	do	8
151.2725	do	8, 24
151.280	do	8
151.2875	do	8, 24
151.295	do	8
151.310	Base	8, 10, 12, 49
151.325	Base or mobile	8
151.3325	do	8, 24
151.340	do	8
151.3475	do	8, 24
151.355	do	8
151.3625	do	8, 24
151.370	do	8
151.3775	do	8, 24
151.385	do	8
151.3925	do	8, 24
151.400	do	8
151.4075	do	8, 24
151.415	do	8
151.4225	do	8, 24
151.430	do	8
151.4375	do	8, 24
151.445	do	8
151.4525	do	8, 24
151.460	do	8
151.4675	do	8, 24
151.475	do	8
151.4825	do	8, 24
151.625	do	1, 3
151.640	do	1, 2, 46
151.6475	do	1, 2, 24
151.655	do	1, 2
151.6625	do	1, 2, 24
151.670	do	1, 2, 24
151.6775	do	1, 2, 24
151.685	do	1, 2
151.700	do	3, 30, 47
151.715	do	1, 2
151.7225	do	1, 2, 24
151.730	do	1, 2, 24
151.7375	do	1, 2, 24
151.745	do	1, 2
151.760	do	3, 30, 47
151.775	do	1, 2
151.7825	do	1, 2, 24
151.790	do	1, 2, 24
151.7975	do	1, 2, 24
151.805	do	1, 2
151.820	Mobile	13, 22, 47, 51
151.835	Base or mobile	1, 2
151.8425	do	1, 2, 24
151.850	do	1, 2, 24
151.8575	do	1, 2, 24
151.865	do	1, 2
151.880	Mobile	13, 22, 47, 51
151.895	Base or mobile	1, 2
151.9025	do	1, 2, 24
151.910	do	1, 2, 24
151.9175	do	1, 2, 24
151.925	do	
151.940	Mobile	13, 22, 47, 51
151.955	Base or mobile	
151.9625	do	1, 2, 24
151.970	do	1, 2, 24
151.9775	do	1, 2, 24
152.300	do	9
152.3075	do	9, 24
152.315	do	1, 9
152.3225	do	1, 9, 24
152.345	do	1, 9
152.3525	do	1, 9, 24
152.360	do	9
152.3675	do	9, 24
152.375	do	1, 9
152.3825	do	1, 9, 24
152.405	do	1, 9
152.4125	do	1, 9, 24
152.420	do	9
152.4275	do	9, 24
152.480	Base	10, 11, 12, 49
154.45625	Mobile	18, 19, 36
154.46375	do	18, 19, 35, 37
154.47125	do	18, 19, 35
154.515	Base or mobile	1, 2
154.5275	Mobile	3, 30, 47
154.540	Base or mobile	1, 2
154.5475	do	1, 2, 24
154.555	do	1, 2, 46
154.570	Mobile	4, 13, 22
154.600	do	4, 14, 22
154.610	Base or mobile	1, 2, 46
154.625	Base	10, 11, 15, 49

Frequency or band	Class of station(s)	Limitations
154.640	do	10, 11, 15, 24
157.560	Base or mobile	9
157.5675	do	9, 24
157.575	Mobile	1, 9
157.5825	do	1, 9, 24
157.605	Mobile	1, 9
157.6125	do	1, 9, 24
157.620	Base or mobile	9
157.6275	do	9, 24
157.635	Mobile	1, 9
157.6425	do	1, 9, 24
157.665	Mobile	1, 9
157.6725	do	1, 9, 24
157.680	do	9
157.6875	do	9, 24
157.740	Base	10, 11, 12, 49
158.460	do	10, 11, 12, 15, 49
169 to 172	Mobile, operational fixed	17
173.20375	Mobile	18, 19, 35
173.2100	do	18, 20, 35
173.2375	do	18, 19, 36
173.2625	do	18, 19, 36
173.2875	do	18, 19, 36
173.3125	do	18, 19, 36
173.3375	do	18, 19, 36
173.3625	do	18, 19, 36
173.3900	do	18, 20, 35
173.39625	do	18, 19, 35
216 to 220	Base or mobile	21
220-222	Base and mobile	44
406 to 413	Operational fixed	17
450 to 470	Base or mobile	48
457.5125	Mobile	50
457.525	do	4, 14, 22, 23
457.53125	do	4, 14, 22, 23, 46
457.53750	do	4, 14, 22, 23, 24
457.54375	do	4, 14, 22, 23, 46
457.550	do	4, 14, 22, 23
457.55625	do	4, 14, 22, 23, 46
457.56250	do	4, 14, 22, 23, 24
457.56875	do	4, 14, 22, 23, 46
457.575	do	4, 14, 22, 23
457.58125	do	4, 14, 22, 23, 46
457.58750	do	4, 14, 22, 23, 24
457.59375	do	4, 14, 22, 23, 46
457.600	do	4, 14, 22, 23
457.60625	do	4, 14, 22, 23, 46
457.61250	do	4, 14, 22, 23, 24
457.61875	do	4, 14, 22, 23, 46
460.650	Base or mobile	2, 15, 25, 26
460.65625	do	2, 15, 25, 26, 46
460.66250	do	2, 15, 24, 25, 26
460.66875	do	2, 15, 25, 26, 46
460.675	do	2, 15, 25, 26
460.68125	do	2, 15, 25, 26, 46
460.68750	do	2, 15, 24, 25, 26
460.69375	do	2, 15, 25, 26, 46
460.700	do	2, 15, 25, 26
460.70625	do	2, 15, 25, 26, 46
460.71250	do	2, 15, 24, 25, 26
460.71875	do	2, 15, 25, 26, 46
460.725	do	2, 15, 25, 26
460.73125	do	2, 15, 25, 26, 46
460.73750	do	2, 15, 24, 25, 26
460.74375	do	2, 15, 25, 26, 46
460.750	do	2, 15, 25, 26
460.75625	do	2, 15, 25, 26, 46
460.76250	do	2, 15, 24, 25, 26
460.76875	do	2, 15, 25, 26, 46
460.775	do	2, 15, 25, 26
460.78125	do	2, 15, 25, 26, 46
460.78750	do	2, 15, 24, 25, 26
460.79375	do	2, 15, 25, 26, 46
460.800	do	2, 15, 25, 26
460.80625	do	2, 15, 25, 26, 46
460.81250	do	2, 15, 24, 25, 26
460.81875	do	2, 15, 25, 26, 46
460.825	do	2, 15, 25, 26
460.83125	do	2, 15, 25, 26, 46
460.83750	do	2, 15, 24, 25, 26
460.84375	do	2, 15, 25, 26, 46
460.850	do	2, 15, 25, 26
460.85625	do	2, 15, 25, 26, 46
460.86250	do	2, 15, 24, 25, 26
460.86875	do	2, 15, 25, 26, 46
460.875	do	2, 15, 25, 26
460.88125	do	2, 15, 25, 26, 46
460.88750	do	2, 15, 24, 25, 26
460.89375	do	2, 15, 25, 26, 46
460.900	do	1, 2, 27, 39, 40
460.90625	do	1, 2, 27, 39, 40, 46
460.91250	do	1, 2, 24, 27, 39, 40
460.91875	do	1, 2, 27, 39, 40, 46
460.925	do	1, 2, 27, 39, 40
460.93125	do	1, 2, 27, 39, 40, 46
460.93750	do	1, 2, 24, 27, 39, 40
460.94375	do	1, 2, 27, 39, 40, 46
460.950	do	1, 2, 27, 39, 40
460.95625	do	1, 2, 27, 39, 40, 46
460.96250	do	1, 2, 24, 27, 39, 40
460.96875	do	1, 2, 27, 39, 40, 46
460.975	do	1, 2, 28, 39, 40
460.98125	do	1, 2, 28, 39, 40, 46
460.98750	do	1, 2, 24, 28, 39, 40
460.99375	do	1, 2, 28, 39, 40, 46
461.000	do	1, 2, 28, 39, 40
461.00625	do	1, 2, 28, 39, 40, 46
461.01250	do	1, 2, 24, 28, 39, 40
461.01875	do	1, 2, 28, 39, 40, 46
461.025	do	1, 2, 26
461.03125	do	1, 2, 26, 46
461.03750	do	1, 2, 24, 26
461.04375	do	1, 2, 26, 46
461.050	do	1, 2, 26
461.05625	do	1, 2, 26, 46
461.06250	do	1, 2, 24, 26
461.06875	do	1, 2, 26, 46
461.075	do	1, 2, 26
461.08125	do	1, 2, 26, 46
461.08750	do	1, 2, 24, 26

Frequency or band	Class of station(s)	Limitations
461.09375	do	1, 2, 26, 46
461.100	do	1, 2, 26
461.10625	do	1, 2, 26, 46
461.11250	do	1, 2, 24, 26
461.11875	do	1, 2, 26, 46
461.125	do	1, 2, 26
461.13125	do	1, 2, 26, 46
461.13750	do	1, 2, 24, 26
461.14375	do	1, 2, 26, 46
461.150	do	1, 2, 26
461.15625	do	1, 2, 26, 46
461.16250	do	1, 2, 24, 26
461.16875	do	1, 2, 26, 46
461.175	do	1, 2, 26
461.18125	do	1, 2, 26, 46
461.18750	do	1, 2, 24, 26
461.19375	do	1, 2, 26, 46
461.200	do	1, 2, 26
461.20625	do	1, 2, 26, 46
461.21250	do	1, 2, 24, 26
461.21875	do	1, 2, 26, 46
461.225	do	1, 2, 26
461.23125	do	1, 2, 26, 46
461.23750	do	1, 2, 24, 26
461.24375	do	1, 2, 26, 46
461.250	do	1, 2, 26
461.25625	do	1, 2, 26, 46
461.26250	do	1, 2, 24, 26
461.26875	do	1, 2, 26, 46
461.275	do	1, 2, 26
461.28125	do	1, 2, 26, 46
461.28750	do	1, 2, 24, 26
461.29375	do	1, 2, 26, 46
461.300	do	1, 2, 26
461.30625	do	1, 2, 26, 46
461.31250	do	1, 2, 24, 26
461.31875	do	1, 2, 26, 46
461.325	do	1, 2, 26
461.33125	do	1, 2, 26, 46
461.33750	do	1, 2, 24, 26
461.34375	do	1, 2, 26, 46
461.350	do	1, 2, 26
461.35625	do	1, 2, 26, 46
461.36250	do	1, 2, 24, 26
461.36875	do	1, 2, 26, 46
461.375	do	1, 2, 26
461.38125	do	1, 2, 26, 46
461.38750	do	1, 2, 24, 26
461.39375	do	1, 2, 26, 46
461.400	do	1, 2, 26
461.40625	do	1, 2, 26, 46
461.41250	do	1, 2, 24, 26
461.41875	do	1, 2, 26, 46
461.425	do	1, 2, 26
461.43125	do	1, 2, 26, 46
461.43750	do	1, 2, 24, 26
461.44375	do	1, 2, 26, 46
461.450	do	1, 2, 26
461.45625	do	1, 2, 26, 46
461.46250	do	1, 2, 24, 26
461.46875	do	1, 2, 26, 46
461.475	do	1, 2, 26
461.48125	do	1, 2, 26, 46
461.48750	do	1, 2, 24, 26
461.49375	do	1, 2, 26, 46
461.500	do	1, 2, 26
461.50625	do	1, 2, 26, 46
461.51250	do	1, 2, 24, 26
461.51875	do	1, 2, 26, 46
461.525	do	1, 2, 26
461.53125	do	1, 2, 26, 46
461.53750	do	1, 2, 24, 26
461.54375	do	1, 2, 26, 46
461.550	do	1, 2, 26
461.55625	do	1, 2, 26, 46
461.56250	do	1, 2, 24, 26
461.56875	do	1, 2, 26, 46
461.575	do	1, 2, 26
461.58125	do	1, 2, 26, 46
461.58750	do	1, 2, 24, 26
461.59375	do	1, 2, 26, 46
461.600	do	1, 2, 26
461.60625	do	1, 2, 26, 46
461.61250	do	1, 2, 24, 26
461.61875	do	1, 2, 26, 46
461.625	do	1, 2, 26
461.63125	do	1, 2, 26, 46
461.63750	do	1, 2, 24, 26
461.64375	do	1, 2, 26, 46
461.650	do	1, 2, 26
461.65625	do	1, 2, 26, 46
461.66250	do	1, 2, 24, 26
461.66875	do	1, 2, 26, 46
461.675	do	1, 2, 26
461.68125	do	1, 2, 26, 46
461.68750	do	1, 2, 24, 26
461.69375	do	1, 2, 26, 46
461.700	do	1, 2, 26
461.70625	do	1, 2, 26, 46
461.71250	do	1, 2, 24, 26
461.71875	do	1, 2, 26, 46
461.725	do	1, 2, 26
461.73125	do	1, 2, 26, 46
461.73750	do	1, 2, 24, 26
461.74375	do	1, 2, 26, 46
461.750	do	1, 2, 26
461.75625	do	1, 2, 26, 46
461.76250	do	1, 2, 24, 26
461.76875	do	1, 2, 26, 46
461.775	do	1, 2, 26
461.78125	do	1, 2, 26, 46
461.78750	do	1, 2, 24, 26
461.79375	do	1, 2, 26, 46
461.800	do	1, 2, 26
461.80625	do	1, 2, 26, 46
461.81250	do	1, 2, 24, 26
461.81875	do	1, 2, 26, 46
461.825	do	1, 2, 26
461.83125	do	1, 2, 26, 46
461.83750	do	1, 2, 24, 26

Frequency or band	Class of station(s)	Limitations
461.84375	do	1, 2, 26, 46
461.850	do	1, 2, 26
461.85625	do	1, 2, 26, 46
461.86250	do	1, 2, 24, 26
461.86875	do	1, 2, 26, 46
461.875	do	1, 2, 26
461.88125	do	1, 2, 26, 46
461.88750	do	1, 2, 24, 26
461.89375	do	1, 2, 26, 46
461.900	do	1, 2, 26
461.90625	do	1, 2, 26, 46
461.91250	do	1, 2, 24, 26
461.91875	do	1, 2, 26, 46
461.925	do	1, 2, 26
461.93125	do	1, 2, 26, 46
461.93750	do	1, 2, 24, 26
461.94375	do	1, 2, 26, 46
461.950	do	1, 2, 26
461.95625	do	1, 2, 26, 46
461.96250	do	1, 2, 24, 26
461.96875	do	1, 2, 26, 46
461.975	do	1, 2, 26
461.98125	do	1, 2, 26, 46
461.98750	do	1, 2, 24, 26
461.99375	do	1, 2, 26, 46
462.000	do	1, 2, 26
462.00625	do	1, 2, 26, 46
462.01250	do	1, 2, 24, 26
462.01875	do	1, 2, 26, 46
462.025	do	1, 2, 26
462.03125	do	1, 2, 26, 46
462.03750	do	1, 2, 24, 26
462.04375	do	1, 2, 26, 46
462.050	do	1, 2, 26
462.05625	do	1, 2, 26, 46
462.06250	do	1, 2, 24, 26
462.06875	do	1, 2, 26, 46
462.075	do	1, 2, 26
462.08125	do	1, 2, 26, 46
462.08750	do	1, 2, 24, 26
462.09375	do	1, 2, 26, 46
462.100	do	1, 2, 26
462.10625	do	1, 2, 26, 46
462.11250	do	1, 2, 24, 26
462.11875	do	1, 2, 26, 46
462.125	do	1, 2, 26
462.13125	do	1, 2, 26, 46
462.13750	do	1, 2, 24, 26
462.14375	do	1, 2, 26, 46
462.150	do	1, 2, 26
462.15625	do	1, 2, 26, 46
462.16250	do	1, 2, 24, 26
462.16875	do	1, 2, 26, 46
462.175	do	1, 2, 26
462.18125	do	1, 2, 26, 46
462.18750	do	1, 2, 24, 26
462.19375	do	1, 2, 26, 46
462.750	Base	10, 49
462.7625	Mobile	50
462.775	Base	10, 49
462.7875	Mobile	50
462.800	Base	10, 49
462.8125	Mobile	50
462.825	Base	10, 49
462.8375	Mobile	50
462.850	Base	10, 49
462.8625	Mobile	50
462.875	Base	10, 49
462.8875	Mobile	50
462.900	Base	10, 49
462.9125	Mobile	50
462.925	Base	10, 49
462.93750	do	24, 49
462.94375	do	46
463.200	Base or mobile	1, 2, 26
463.20625	do	1, 2, 26, 46
463.21250	do	1, 2, 24, 26
463.21875	do	1, 2, 26, 46
463.225	do	1, 2, 26
463.23125	do	1, 2, 26, 46
463.23750	do	1, 2, 24, 26
463.24375	do	1, 2, 26, 46
463.250	do	1, 2, 26
463.25625	do	1, 2, 26, 46
463.26250	do	1, 2, 24, 26
463.26875	do	1, 2, 26, 46
463.275	do	1, 2, 26
463.28125	do	1, 2, 26, 46
463.28750	do	1, 2, 24, 26
463.29375	do	1, 2, 26, 46
463.300	do	1, 2, 26
463.30625	do	1, 2, 26, 46
463.31250	do	1, 2, 24, 26
463.31875	do	1, 2, 26, 46
463.325	do	1, 2, 26
463.33125	do	1, 2, 26, 46
463.33750	do	1, 2, 24, 26
463.34375	do	1, 2, 26, 46
463.350	do	1, 2, 26
463.35625	do	1, 2, 26, 46
463.36250	do	1, 2, 24, 26
463.36875	do	1, 2, 26, 46
463.375	do	1, 2, 26
463.38125	do	1, 2, 26, 46
463.38750	do	1, 2, 24, 26
463.39375	do	1, 2, 26, 46
463.400	do	1, 2, 26
463.40625	do	1, 2, 26, 46
463.41250	do	1, 2, 24, 26
463.41875	do	1, 2, 26, 46
463.425	do	1, 2, 26
463.43125	do	1, 2, 26, 46
463.43750	do	1, 2, 24, 26
463.44375	do	1, 2, 26, 46
463.450	do	1, 2, 26
463.45625	do	1, 2, 26, 46
463.46250	do	1, 2, 24, 26
463.46875	do	1, 2, 26, 46
463.475	do	1, 2, 26
463.48125	do	1, 2, 26, 46

Frequency or band	Class of station(s)	Limitations
463.48750	do	1, 2, 24, 26
463.49375	do	1, 2, 26, 46
463.500	do	1, 2, 26
463.50625	do	1, 2, 26, 46
463.51250	do	1, 2, 24, 26
463.51875	do	1, 2, 26, 46
463.525	do	1, 2, 26
463.53125	do	1, 2, 26, 46
463.53750	do	1, 2, 24, 26
463.54375	do	1, 2, 26, 46
463.550	do	1, 2, 26
463.55625	do	1, 2, 26, 46
463.56250	do	1, 2, 24, 26
463.56875	do	1, 2, 26, 46
463.575	do	1, 2, 26
463.58125	do	1, 2, 26, 46
463.58750	do	1, 2, 24, 26
463.59375	do	1, 2, 26, 46
463.600	do	1, 2, 26
463.60625	do	1, 2, 26, 46
463.61250	do	1, 2, 24, 26
463.61875	do	1, 2, 26, 46
463.625	do	1, 2, 26
463.63125	do	1, 2, 26, 46
463.63750	do	1, 2, 24, 26
463.64375	do	1, 2, 26, 46
463.650	do	1, 2, 26
463.65625	do	1, 2, 26, 46
463.66250	do	1, 2, 24, 26
463.66875	do	1, 2, 26, 46
463.675	do	1, 2, 26
463.68125	do	1, 2, 26, 46
463.68750	do	1, 2, 24, 26
463.69375	do	1, 2, 26, 46
463.700	do	1, 2, 26
463.70625	do	1, 2, 26, 46
463.71250	do	1, 2, 24, 26
463.71875	do	1, 2, 26, 46
463.725	do	1, 2, 26
463.73125	do	1, 2, 26, 46
463.73750	do	1, 2, 24, 26
463.74375	do	1, 2, 26, 46
463.750	do	1, 2, 26
463.75625	do	1, 2, 26, 46
463.76250	do	1, 2, 24, 26
463.76875	do	1, 2, 26, 46
463.775	do	1, 2, 26
463.78125	do	1, 2, 26, 46
463.78750	do	1, 2, 24, 26
463.79375	do	1, 2, 26, 46
463.800	do	1, 2, 26
463.80625	do	1, 2, 26, 46
463.81250	do	1, 2, 24, 26
463.81875	do	1, 2, 26, 46
463.825	do	1, 2, 26
463.83125	do	1, 2, 26, 46
463.83750	do	1, 2, 24, 26
463.84375	do	1, 2, 26, 46
463.850	do	1, 2, 26
463.85625	do	1, 2, 26, 46
463.86250	do	1, 2, 24, 26
463.86875	do	1, 2, 26, 46
463.875	do	1, 2, 26
463.88125	do	1, 2, 26, 46
463.88750	do	1, 2, 24, 26
463.89375	do	1, 2, 26, 46
463.900	do	1, 2, 26
463.90625	do	1, 2, 26, 46
463.91250	do	1, 2, 24, 26
463.91875	do	1, 2, 26, 46
463.925	do	1, 2, 26
463.93125	do	1, 2, 26, 46
463.93750	do	1, 2, 24, 26
463.94375	do	1, 2, 26, 46
463.950	do	1, 2, 26
463.95625	do	1, 2, 26, 46
463.96250	do	1, 2, 24, 26
463.96875	do	1, 2, 26, 46
463.975	do	1, 2, 26
463.98125	do	1, 2, 26, 46
463.98750	do	1, 2, 24, 26
463.99375	do	1, 2, 26, 46
464.000	do	1, 2, 26
464.00625	do	1, 2, 26, 46
464.01250	do	1, 2, 24, 26
464.01875	do	1, 2, 26, 46
464.025	do	1, 2, 26
464.03125	do	1, 2, 26, 46
464.03750	do	1, 2, 24, 26
464.04375	do	1, 2, 26, 46
464.050	do	1, 2, 26
464.05625	do	1, 2, 26, 46
464.06250	do	1, 2, 24, 26
464.06875	do	1, 2, 26, 46
464.075	do	1, 2, 26
464.08125	do	1, 2, 26, 46
464.08750	do	1, 2, 24, 26
464.09375	do	1, 2, 26, 46
464.100	do	1, 2, 26
464.10625	do	1, 2, 26, 46
464.11250	do	1, 2, 24, 26
464.11875	do	1, 2, 26, 46
464.125	do	1, 2, 26
464.13125	do	1, 2, 26, 46
464.13750	do	1, 2, 24, 26
464.14375	do	1, 2, 26, 46
464.150	do	1, 2, 26
464.15625	do	1, 2, 26, 46
464.16250	do	1, 2, 24, 26
464.16875	do	1, 2, 26, 46
464.175	do	1, 2, 26
464.18125	do	1, 2, 26, 46
464.18750	do	1, 2, 24, 26
464.19375	do	1, 2, 26, 46
464.200	do	1, 2, 26
464.20625	do	1, 2, 26, 46
464.21250	do	1, 2, 24, 26
464.21875	do	1, 2, 26, 46
464.225	do	1, 2, 26
464.23125	do	1, 2, 26, 46

Frequency or band	Class of station(s)	Limitations
464.23750	do	1, 2, 24, 26
464.24375	do	1, 2, 26, 46
464.250	do	1, 2, 26
464.25625	do	1, 2, 26, 46
464.26250	do	1, 2, 24, 26
464.26875	do	1, 2, 26, 46
464.275	do	1, 2, 26
464.28125	do	1, 2, 26, 46
464.28750	do	1, 2, 24, 26
464.29375	do	1, 2, 26, 46
464.300	do	1, 2, 26
464.30625	do	1, 2, 26, 46
464.31250	do	1, 2, 24, 26
464.31875	do	1, 2, 26, 46
464.325	do	1, 2, 26, 29
464.33125	do	1, 2, 26, 29, 46
464.33750	do	1, 2, 24, 26, 29
464.34375	do	1, 2, 26, 29, 46
464.350	do	1, 2, 26
464.35625	do	1, 2, 26, 46
464.36250	do	1, 2, 24, 26
464.36875	do	1, 2, 26, 46
464.375	do	1, 2, 26, 29
464.38125	do	1, 2, 26, 29, 46
464.38750	do	1, 2, 24, 26, 29
464.39375	do	1, 2, 26, 29, 46
464.400	do	1, 2, 26
464.40625	do	1, 2, 26, 46
464.41250	do	1, 2, 24, 26
464.41875	do	1, 2, 26, 46
464.425	do	1, 2, 26, 29
464.43125	do	1, 2, 26, 29, 46
464.43750	do	1, 2, 24, 26, 29
464.44375	do	1, 2, 26, 29, 46
464.450	do	1, 2, 26
464.45625	do	1, 2, 26, 46
464.46250	do	1, 2, 24, 26
464.46875	do	1, 2, 26, 46
464.475	do	1, 2, 26, 29
464.48125	do	1, 2, 26, 29, 46
464.4875	do	1, 2, 26, 29, 46
464.500	do	3, 30
464.5125	do	1, 2, 26, 29, 46
464.51875	do	1, 2, 26, 29, 46
464.525	do	1, 2, 26, 29
464.53125	do	1, 2, 26, 29, 46
464.5375	do	1, 2, 26, 29, 46
464.550	do	3, 30
464.5625	do	1, 2, 26, 29, 46
464.56875	do	1, 2, 26, 29, 46
464.575	do	1, 2, 26, 29
464.58125	do	1, 2, 26, 29, 46
464.58750	do	1, 2, 24, 26, 29
464.59375	do	1, 2, 26, 29, 46
464.600	do	1, 26
464.60625	do	1, 26, 46
464.61250	do	1, 24, 26
464.61875	do	1, 26, 46
464.625	do	1, 26
464.63125	do	1, 26, 46
464.63750	do	1, 24, 26
464.64375	do	1, 26, 46
464.650	do	1, 26
464.65625	do	1, 26, 46
464.66250	do	1, 24, 26
464.66875	do	1, 26, 46
464.675	do	1, 2, 26, 29
464.68125	do	1, 2, 26, 29, 46
464.68750	do	1, 2, 24, 26, 29
464.69375	do	1, 2, 26, 29, 46
464.700	do	1, 26
464.70625	do	1, 26, 46
464.71250	do	1, 24, 26
464.71875	do	1, 26, 46
464.725	do	1, 26
464.73125	do	1, 26, 46
464.73750	do	1, 24, 26
464.74375	do	1, 26, 46
464.750	do	1, 26
464.75625	do	1, 26, 46
464.76250	do	1, 24, 26
464.76875	do	1, 26, 46
464.775	do	1, 2, 26, 29
464.78125	do	1, 2, 26, 29, 46
464.78750	do	1, 2, 24, 26, 29
464.79375	do	1, 2, 26, 29, 46
464.800	do	1, 2, 26
464.80625	do	1, 2, 26, 46
464.81250	do	1, 2, 24, 26
464.81875	do	1, 2, 26, 46
464.825	do	1, 2, 26, 29
464.83125	do	1, 2, 26, 29, 46
464.83750	do	1, 2, 24, 26, 29
464.84375	do	1, 2, 26, 29, 46
464.850	do	1, 2, 26
464.85625	do	1, 2, 26, 46
464.86250	do	1, 2, 24, 26
464.86875	do	1, 2, 26, 46
464.875	do	1, 2, 26, 29
464.88125	do	1, 2, 26, 29, 46
464.88750	do	1, 2, 24, 26, 29
464.89375	do	1, 2, 26, 29, 46
464.900	do	1, 2, 26
464.90625	do	1, 2, 26, 46
464.91250	do	1, 2, 24, 26
464.91875	do	1, 2, 26, 46
464.925	do	1, 2, 26, 29
464.93125	do	1, 2, 26, 29, 46
464.93750	do	1, 2, 24, 26, 29
464.94375	do	1, 2, 26, 29, 46
464.950	do	1, 2, 26
464.95625	do	1, 2, 26, 46
464.96250	do	1, 2, 24, 26
464.96875	do	1, 2, 26, 46
464.975	do	1, 2, 26, 29
464.98125	do	1, 2, 26, 29, 46
464.98750	do	1, 2, 24, 26, 29
465.000	Base	10, 30, 49
465.01250	do	24, 30
465.01875	do	30, 46

Frequency or band	Class of station(s)	Limitations
465.650	Mobile	2, 4, 25, 26, 31
465.65625	do	2, 4, 25, 26, 31, 46
465.66250	do	2, 4, 24, 25, 26, 31
465.66875	do	2, 4, 25, 26, 31, 46
465.675	do	2, 4, 25, 26, 31
465.68125	do	2, 4, 25, 26, 31, 46
465.68750	do	2, 4, 24, 25, 26, 31
465.69375	do	2, 4, 25, 26, 31, 46
465.700	do	2, 4, 25, 26, 31
465.70625	do	2, 4, 25, 26, 31, 46
465.71250	do	2, 4, 24, 25, 26, 31
465.71875	do	2, 4, 25, 26, 31, 46
465.725	do	2, 4, 25, 26, 31
465.73125	do	2, 4, 25, 26, 31, 46
465.73750	do	2, 4, 24, 25, 26, 31
465.74375	do	2, 4, 25, 26, 31, 46
465.750	do	2, 4, 25, 26, 31
465.75625	do	2, 4, 25, 26, 31, 46
465.76250	do	2, 4, 24, 25, 26, 31
465.76875	do	2, 4, 25, 26, 31, 46
465.775	do	2, 4, 25, 26, 31
465.78125	do	2, 4, 25, 26, 31, 46
465.78750	do	2, 4, 24, 25, 26, 31
465.79375	do	2, 4, 25, 26, 31, 46
465.800	do	2, 4, 25, 26, 31
465.80625	do	2, 4, 25, 26, 31, 46
465.81250	do	2, 4, 24, 25, 26, 31
465.81875	do	2, 4, 25, 26, 31, 46
465.825	do	2, 4, 25, 26, 31
465.83125	do	2, 4, 25, 26, 31, 46
465.83750	do	2, 4, 24, 25, 26, 31
465.84375	do	2, 4, 25, 26, 31, 46
465.850	do	2, 4, 25, 26, 31
465.85625	do	2, 4, 25, 26, 31, 46
465.86250	do	2, 4, 24, 25, 26, 31
465.86875	do	2, 4, 25, 26, 31, 46
465.875	do	2, 4, 25, 26, 31
465.88125	do	2, 4, 25, 26, 31, 46
465.88750	do	2, 4, 24, 25, 26, 31
465.89375	do	2, 4, 25, 26, 31, 46
465.900	do	1, 2, 27, 39
465.90625	do	1, 2, 27, 39, 46
465.91250	do	1, 2, 24, 27, 39
465.91875	do	1, 2, 27, 39, 46
465.925	do	1, 2, 27, 39
465.93125	do	1, 2, 27, 39, 46
465.93750	do	1, 2, 24, 27, 39
465.94375	do	1, 2, 27, 39, 46
465.950	do	1, 2, 27, 39
465.95625	do	1, 2, 27, 39, 46
465.96250	do	1, 2, 24, 27, 39
465.96875	do	1, 2, 27, 39, 46
465.975	do	1, 2, 28, 39
465.98125	do	1, 2, 28, 39, 46
465.98750	do	1, 2, 24, 28, 39
465.99375	do	1, 2, 28, 39, 46
466.000	do	1, 2, 28, 39
466.00625	do	1, 2, 28, 39, 46
466.01250	do	1, 2, 24, 28, 39
466.01875	do	1, 2, 28, 39, 46
466.025	do	1, 2, 26
466.03125	do	1, 2, 26, 46
466.03750	do	1, 2, 24, 26
466.04375	do	1, 2, 26, 46
466.050	do	1, 2, 26
466.05625	do	1, 2, 26, 46
466.06250	do	1, 2, 24, 26
466.06875	do	1, 2, 26, 46
466.075	do	1, 2, 26
466.08125	do	1, 2, 26, 46
466.08750	do	1, 2, 24, 26
466.09375	do	1, 2, 26, 46
466.100	do	1, 2, 26
466.10625	do	1, 2, 26, 46
466.11250	do	1, 2, 24, 26
466.11875	do	1, 2, 26, 46
466.125	do	1, 2, 26
466.13125	do	1, 2, 26, 46
466.13750	do	1, 2, 24, 26
466.14375	do	1, 2, 26, 46
466.150	do	1, 2, 26
466.15625	do	1, 2, 26, 46
466.16250	do	1, 2, 24, 26
466.16875	do	1, 2, 26, 46
466.175	do	1, 2, 26
466.18125	do	1, 2, 26, 46
466.18750	do	1, 2, 24, 26
466.19375	do	1, 2, 26, 46
466.200	do	1, 2, 26
466.20625	do	1, 2, 26, 46
466.21250	do	1, 2, 24, 26
466.21875	do	1, 2, 26, 46
466.225	do	1, 2, 26
466.23125	do	1, 2, 26, 46
466.23750	do	1, 2, 24, 26
466.24375	do	1, 2, 26, 46
466.250	do	1, 2, 26
466.25625	do	1, 2, 26, 46
466.26250	do	1, 2, 24, 26
466.26875	do	1, 2, 26, 46
466.275	do	1, 2, 26
466.28125	do	1, 2, 26, 46
466.28750	do	1, 2, 24, 26
466.29375	do	1, 2, 26, 46
466.300	do	1, 2, 26
466.30625	do	1, 2, 26, 46
466.31250	do	1, 2, 24, 26
466.31875	do	1, 2, 26, 46
466.325	do	1, 2, 26
466.33125	do	1, 2, 26, 46
466.33750	do	1, 2, 24, 26
466.34375	do	1, 2, 26, 46
466.350	do	1, 2, 26
466.35625	do	1, 2, 26, 46
466.36250	do	1, 2, 24, 26
466.36875	do	1, 2, 26, 46
466.375	do	1, 2, 26
466.38125	do	1, 2, 26, 46
466.38750	do	1, 2, 24, 26
466.39375	do	1, 2, 26, 46

Frequency or band	Class of station(s)	Limitations
466.400	do	1, 2, 26
466.40625	do	1, 2, 26, 46
466.41250	do	1, 2, 24, 26
466.41875	do	1, 2, 26, 46
466.425	do	1, 2, 26
466.43125	do	1, 2, 26, 46
466.43750	do	1, 2, 24, 26
466.44375	do	1, 2, 26, 46
466.450	do	1, 2, 26
466.45625	do	1, 2, 26, 46
466.46250	do	1, 2, 24, 26
466.46875	do	1, 2, 26, 46
466.475	do	1, 2, 26
466.48125	do	1, 2, 26, 46
466.48750	do	1, 2, 24, 26
466.49375	do	1, 2, 26, 46
466.500	do	1, 2, 26
466.50625	do	1, 2, 26, 46
466.51250	do	1, 2, 24, 26
466.51875	do	1, 2, 26, 46
466.525	do	1, 2, 26
466.53125	do	1, 2, 26, 46
466.53750	do	1, 2, 24, 26
466.54375	do	1, 2, 26, 46
466.550	do	1, 2, 26
466.55625	do	1, 2, 26, 46
466.56250	do	1, 2, 24, 26
466.56875	do	1, 2, 26, 46
466.575	do	1, 2, 26
466.58125	do	1, 2, 26, 46
466.58750	do	1, 2, 24, 26
466.59375	do	1, 2, 26, 46
466.600	do	1, 2, 26
466.60625	do	1, 2, 26, 46
466.61250	do	1, 2, 24, 26
466.61875	do	1, 2, 26, 46
466.625	do	1, 2, 26
466.63125	do	1, 2, 26, 46
466.63750	do	1, 2, 24, 26
466.64375	do	1, 2, 26, 46
466.650	do	1, 2, 26
466.65625	do	1, 2, 26, 46
466.66250	do	1, 2, 24, 26
466.66875	do	1, 2, 26, 46
466.675	do	1, 2, 26
466.68125	do	1, 2, 26, 46
466.68750	do	1, 2, 24, 26
466.69375	do	1, 2, 26, 46
466.700	do	1, 2, 26
466.70625	do	1, 2, 26, 46
466.71250	do	1, 2, 24, 26
466.71875	do	1, 2, 26, 46
466.725	do	1, 2, 26
466.73125	do	1, 2, 26, 46
466.73750	do	1, 2, 24, 26
466.74375	do	1, 2, 26, 46
466.750	do	1, 2, 26
466.75625	do	1, 2, 26, 46
466.76250	do	1, 2, 24, 26
466.76875	do	1, 2, 26, 46
466.775	do	1, 2, 26
466.78125	do	1, 2, 26, 46
466.78750	do	1, 2, 24, 26
466.79375	do	1, 2, 26, 46
466.800	do	1, 2, 26
466.80625	do	1, 2, 26, 46
466.81250	do	1, 2, 24, 26
466.81875	do	1, 2, 26, 46
466.825	do	1, 2, 26
466.83125	do	1, 2, 26, 46
466.83750	do	1, 2, 24, 26
466.84375	do	1, 2, 26, 46
466.850	do	1, 2, 26
466.85625	do	1, 2, 26, 46
466.86250	do	1, 2, 24, 26
466.86875	do	1, 2, 26, 46
466.875	do	1, 2, 26
466.88125	do	1, 2, 26, 46
466.88750	do	1, 2, 24, 26
466.89375	do	1, 2, 26, 46
466.900	do	1, 2, 26
466.90625	do	1, 2, 26, 46
466.91250	do	1, 2, 24, 26
466.91875	do	1, 2, 26, 46
466.925	do	1, 2, 26
466.93125	do	1, 2, 26, 46
466.93750	do	1, 2, 24, 26
466.94375	do	1, 2, 26, 46
466.950	do	1, 2, 26
466.95625	do	1, 2, 26, 46
466.96250	do	1, 2, 24, 26
466.96875	do	1, 2, 26, 46
466.975	do	1, 2, 26
466.98125	do	1, 2, 26, 46
466.98750	do	1, 2, 24, 26
466.99375	do	1, 2, 26, 46
467.000	do	1, 2, 26
467.00625	do	1, 2, 26, 46
467.01250	do	1, 2, 24, 26
467.01875	do	1, 2, 26, 46
467.025	do	1, 2, 26
467.03125	do	1, 2, 26, 46
467.03750	do	1, 2, 24, 26
467.04375	do	1, 2, 26, 46
467.050	do	1, 2, 26
467.05625	do	1, 2, 26, 46
467.06250	do	1, 2, 24, 26
467.06875	do	1, 2, 26, 46
467.075	do	1, 2, 26
467.08125	do	1, 2, 26, 46
467.08750	do	1, 2, 24, 26
467.09375	do	1, 2, 26, 46
467.100	do	1, 2, 26
467.10625	do	1, 2, 26, 46
467.11250	do	1, 2, 24, 26
467.11875	do	1, 2, 26, 46
467.125	do	1, 2, 26
467.13125	do	1, 2, 26, 46
467.13750	do	1, 2, 24, 26
467.14375	do	1, 2, 26, 46

Frequency or band	Class of station(s)	Limitations
467.150	do	1, 2, 26
467.15625	do	1, 2, 26, 46
467.16250	do	1, 2, 24, 26
467.16875	do	1, 2, 26, 46
467.175	do	1, 2, 26
467.18125	do	1, 2, 26, 46
467.18750	do	1, 2, 24, 26
467.19375	do	1, 2, 26, 46
467.74375	do	1, 2, 26, 46
467.750	do	4, 13, 22, 23
467.75625	do	4, 13, 22, 23, 46
467.76250	do	4, 13, 22, 23, 24
467.76875	do	4, 13, 22, 23, 46
467.775	do	4, 13, 22, 23
467.78125	do	4, 13, 22, 23, 46
467.78750	do	4, 13, 22, 23, 24
467.79375	do	4, 13, 22, 23, 46
467.800	do	4, 13, 22, 23
467.80625	do	4, 13, 22, 23, 46
467.81250	do	4, 13, 22, 23, 24
467.81875	do	4, 13, 22, 23, 46
467.825	do	4, 13, 22, 23
467.83125	do	4, 13, 22, 23, 46
467.8375	do	4, 13, 22, 23, 46
467.850	do	4, 13, 22
467.8625	do	50
467.875	do	4, 13, 22
467.8875	do	50
467.900	do	4, 13, 22
467.9125	do	50
467.925	do	4, 13, 22
467.93125	do	1, 2, 46
467.94375	do	1, 2, 46
468.200	do	1, 2, 26
468.20625	do	1, 2, 26, 46
468.21250	do	1, 2, 24, 26
468.21875	do	1, 2, 26, 46
468.225	do	1, 2, 26
468.23125	do	1, 2, 26, 46
468.23750	do	1, 2, 24, 26
468.24375	do	1, 2, 26, 46
468.250	do	1, 2, 26
468.25625	do	1, 2, 26, 46
468.26250	do	1, 2, 24, 26
468.26875	do	1, 2, 26, 46
468.275	do	1, 2, 26
468.28125	do	1, 2, 26, 46
468.28750	do	1, 2, 24, 26
468.29375	do	1, 2, 26, 46
468.300	do	1, 2, 26
468.30625	do	1, 2, 26, 46
468.31250	do	1, 2, 24, 26
468.31875	do	1, 2, 26, 46
468.325	do	1, 2, 26
468.33125	do	1, 2, 26, 46
468.33750	do	1, 2, 24, 26
468.34375	do	1, 2, 26, 46
468.350	do	1, 2, 26
468.35625	do	1, 2, 26, 46
468.36250	do	1, 2, 24, 26
468.36875	do	1, 2, 26, 46
468.375	do	1, 2, 26
468.38125	do	1, 2, 26, 46
468.38750	do	1, 2, 24, 26
468.39375	do	1, 2, 26, 46
468.400	do	1, 2, 26
468.40625	do	1, 2, 26, 46
468.41250	do	1, 2, 24, 26
468.41875	do	1, 2, 26, 46
468.425	do	1, 2, 26
468.43125	do	1, 2, 26, 46
468.43750	do	1, 2, 24, 26
468.44375	do	1, 2, 26, 46
468.450	do	1, 2, 26
468.45625	do	1, 2, 26, 46
468.46250	do	1, 2, 24, 26
468.46875	do	1, 2, 26, 46
468.475	do	1, 2, 26
468.48125	do	1, 2, 26, 46
468.48750	do	1, 2, 24, 26
468.49375	do	1, 2, 26, 46
468.500	do	1, 2, 26
468.50625	do	1, 2, 26, 46
468.51250	do	1, 2, 24, 26
468.51875	do	1, 2, 26, 46
468.525	do	1, 2, 26
468.53125	do	1, 2, 26, 46
468.53750	do	1, 2, 24, 26
468.54375	do	1, 2, 26, 46
468.550	do	1, 2, 26
468.55625	do	1, 2, 26, 46
468.56250	do	1, 2, 24, 26
468.56875	do	1, 2, 26, 46
468.575	do	1, 2, 26
468.58125	do	1, 2, 26, 46
468.58750	do	1, 2, 24, 26
468.59375	do	1, 2, 26, 46
468.600	do	1, 2, 26
468.60625	do	1, 2, 26, 46
468.61250	do	1, 2, 24, 26
468.61875	do	1, 2, 26, 46
468.625	do	1, 2, 26
468.63125	do	1, 2, 26, 46
468.63750	do	1, 2, 24, 26
468.64375	do	1, 2, 26, 46
468.650	do	1, 2, 26
468.65625	do	1, 2, 26, 46
468.66250	do	1, 2, 24, 26
468.66875	do	1, 2, 26, 46
468.675	do	1, 2, 26
468.68125	do	1, 2, 26, 46
468.68750	do	1, 2, 24, 26
468.69375	do	1, 2, 26, 46
468.700	do	1, 2, 26
468.70625	do	1, 2, 26, 46
468.71250	do	1, 2, 24, 26
468.71875	do	1, 2, 26, 46
468.725	do	1, 2, 26
468.73125	do	1, 2, 26, 46
468.73750	do	1, 2, 24, 26

Frequency or band	Class of station(s)	Limitations
468.74375	do	1, 2, 26, 46
468.750	do	1, 2, 26
468.75625	do	1, 2, 26, 46
468.76250	do	1, 2, 24, 26
468.76875	do	1, 2, 26, 46
468.775	do	1, 2, 26
468.78125	do	1, 2, 26, 46
468.78750	do	1, 2, 24, 26
468.79375	do	1, 2, 26, 46
468.800	do	1, 2, 26
468.80625	do	1, 2, 26, 46
468.81250	do	1, 2, 24, 26
468.81875	do	1, 2, 26, 46
468.825	do	1, 2, 26
468.83125	do	1, 2, 26, 46
468.83750	do	1, 2, 24, 26
468.84375	do	1, 2, 26, 46
468.850	do	1, 2, 26
468.85625	do	1, 2, 26, 46
468.86250	do	1, 2, 24, 26
468.86875	do	1, 2, 26, 46
468.875	do	1, 2, 26
468.88125	do	1, 2, 26, 46
468.88750	do	1, 2, 24, 26
468.89375	do	1, 2, 26, 46
468.900	do	1, 2, 26
468.90625	do	1, 2, 26, 46
468.91250	do	1, 2, 24, 26
468.91875	do	1, 2, 26, 46
468.925	do	1, 2, 26
468.93125	do	1, 2, 26, 46
468.93750	do	1, 2, 24, 26
468.94375	do	1, 2, 26, 46
468.950	do	1, 2, 26
468.95625	do	1, 2, 26, 46
468.96250	do	1, 2, 24, 26
468.96875	do	1, 2, 26, 46
468.975	do	1, 2, 26
468.98125	do	1, 2, 26, 46
468.98750	do	1, 2, 24, 26
468.99375	do	1, 2, 26, 46
469.000	do	1, 2, 26
469.00625	do	1, 2, 26, 46
469.01250	do	1, 2, 24, 26
469.01875	do	1, 2, 26, 46
469.025	do	1, 2, 26
469.03125	do	1, 2, 26, 46
469.03750	do	1, 2, 24, 26
469.04375	do	1, 2, 26, 46
469.050	do	1, 2, 26
469.05625	do	1, 2, 26, 46
469.06250	do	1, 2, 24, 26
469.06875	do	1, 2, 26, 46
469.075	do	1, 2, 26
469.08125	do	1, 2, 26, 46
469.08750	do	1, 2, 24, 26
469.09375	do	1, 2, 26, 46
469.100	do	1, 2, 26
469.10625	do	1, 2, 26, 46
469.11250	do	1, 2, 24, 26
469.11875	do	1, 2, 26, 46
469.125	do	1, 2, 26
469.13125	do	1, 2, 26, 46
469.13750	do	1, 2, 24, 26
469.14375	do	1, 2, 26, 46
469.150	do	1, 2, 26
469.15625	do	1, 2, 26, 46
469.16250	do	1, 2, 24, 26
469.16875	do	1, 2, 26, 46
469.175	do	1, 2, 26
469.18125	do	1, 2, 26, 46
469.18750	do	1, 2, 24, 26
469.19375	do	1, 2, 26, 46
469.200	do	1, 2, 26
469.20625	do	1, 2, 26, 46
469.21250	do	1, 2, 24, 26
469.21875	do	1, 2, 26, 46
469.225	do	1, 2, 26
469.23125	do	1, 2, 26, 46
469.23750	do	1, 2, 24, 26
469.24375	do	1, 2, 26, 46
469.250	do	1, 2, 26
469.25625	do	1, 2, 26, 46
469.26250	do	1, 2, 24, 26
469.26875	do	1, 2, 26, 46
469.275	do	1, 2, 26
469.28125	do	1, 2, 26, 46
469.28750	do	1, 2, 24, 26
469.29375	do	1, 2, 26, 46
469.300	do	1, 2, 26
469.30625	do	1, 2, 26, 46
469.31250	do	1, 2, 24, 26
469.31875	do	1, 2, 26, 46
469.325	do	1, 2, 26
469.33125	do	1, 2, 26, 46
469.33750	do	1, 2, 24, 26
469.34375	do	1, 2, 26, 46
469.350	do	1, 2, 26
469.35625	do	1, 2, 26, 46
469.36250	do	1, 2, 24, 26
469.36875	do	1, 2, 26, 46
469.375	do	1, 2, 26
469.38125	do	1, 2, 26, 46
469.38750	do	1, 2, 24, 26
469.39375	do	1, 2, 26, 46
469.400	do	1, 2, 26
469.40625	do	1, 2, 26, 46
469.41250	do	1, 2, 24, 26
469.41875	do	1, 2, 26, 46
469.425	do	1, 2, 26
469.43125	do	1, 2, 26, 46
469.43750	do	1, 2, 24, 26
469.44375	do	1, 2, 26, 46
469.450	do	1, 2, 26
469.45625	do	1, 2, 26, 46
469.46250	do	1, 2, 24, 26
469.46875	do	1, 2, 26, 46
469.475	do	1, 2, 26
469.48125	do	1, 2, 26, 46
469.4875	do	1, 2, 26, 46

Frequency or band	Class of station(s)	Limitations
469.500	do	3, 30, 47
469.5125	do	1, 2, 26, 46
469.51875	do	1, 2, 26, 46
469.525	do	1, 2, 26
469.53125	do	1, 2, 26, 46
469.5375	do	1, 2, 26, 46
469.550	do	3, 30, 47
469.5625	do	1, 2, 26, 46
469.56875	do	1, 2, 26, 46
469.575	do	1, 2, 26
469.58125	do	1, 2, 26, 46
469.58750	do	1, 2, 24, 26
469.59375	do	1, 2, 26, 46
469.600	do	1, 26
469.60625	do	1, 26, 46
469.61250	do	1, 24, 26
469.61875	do	1, 26, 46
469.625	do	1, 26
469.63125	do	1, 26, 46
469.63750	do	1, 24, 26
469.64375	do	1, 26, 46
469.650	do	1, 26
469.65625	do	1, 26, 46
469.66250	do	1, 24, 26
469.66875	do	1, 26, 46
469.675	do	1, 2, 26
469.68125	do	1, 2, 26, 46
469.68750	do	1, 2, 24, 26
469.69375	do	1, 2, 26, 46
469.700	do	1, 26
469.70625	do	1, 26, 46
469.71250	do	1, 24, 26
469.71875	do	1, 26, 46
469.725	do	1, 26
469.73125	do	1, 26, 46
469.73750	do	1, 24, 26
469.74375	do	1, 26, 46
469.750	do	1, 26
469.75625	do	1, 26, 46
469.76250	do	1, 24, 26
469.76875	do	1, 26, 46
469.775	do	1, 2, 26
469.78125	do	1, 2, 26, 46
469.78750	do	1, 2, 24, 26
469.79375	do	1, 2, 26, 46
469.800	do	1, 2, 26
469.80625	do	1, 2, 26, 46
469.81250	do	1, 2, 24, 26
469.81875	do	1, 2, 26, 46
469.825	do	1, 2, 26
469.83125	do	1, 2, 26, 46
469.83750	do	1, 2, 24, 26
469.84375	do	1, 2, 26, 46
469.8625	do	30
469.875	do	1, 2, 26
469.88125	do	1, 2, 26, 46
469.88750	do	1, 2, 24, 26
469.89375	do	1, 2, 26, 46
469.900	do	1, 2, 26
469.90625	do	1, 2, 26, 46
469.91250	do	1, 2, 24, 26
469.91875	do	1, 2, 26, 46
469.925	do	1, 2, 26
469.93125	do	1, 2, 26, 46
469.93750	do	1, 2, 24, 26
469.94375	do	1, 2, 26, 46
469.950	do	1, 2, 26
469.95625	do	1, 2, 26, 46
469.96250	do	1, 2, 24, 26
469.96875	do	1, 2, 26, 46
469.975	do	1, 2, 26
469.98125	do	1, 2, 26, 46
470 to 512	Base or mobile	32
806 to 821	Mobile	33
851 to 866	Base or mobile	33
896 to 901	Mobile	33
928 and above	Operational fixed	34
929-930	Base only	42
935 to 940	Base or mobile	33
1427 to 1435	Operational fixed, base or mobile	21
2450 to 2500	Base or mobile	43
10,550 to 10,680*	Base or mobile	

*The frequencies in the band 10.55-10.68 GHz are available for Digital Termination Systems and for associated internodal links in the Point-to-Point Microwave Radio Service. No new licenses will be issued under this Subpart but current licenses will be renewed.

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(23) * * *

Mobile Relay (MHz)	Mobile (MHz)
457.525	467.750
457.53125	467.75625
457.5375	467.7625
457.54375	467.76875
457.550	467.775
457.55625	467.78125
457.5625	467.7875
457.56875	467.79375
457.575	467.800
457.58125	467.80625
457.5875	467.8125
457.59375	467.81875
457.600	467.825
457.60625	467.83125
457.6125	
457.61875	

(24) This frequency is not available in the 150-170 MHz band until August 16, 1996. This frequency will be assigned with an authorized bandwidth not to exceed 11.25 kHz. In the 450-470 MHz band, secondary telemetry operations pursuant to § 90.238(e) will be authorized on this frequency.

* * * * *

(38) [Reserved]

* * * * *

(46) This frequency is not available until August 16, 1996. After August 16, 1996 this frequency will be assigned with an authorized bandwidth not to exceed 6 kHz.

(47) This frequency will be assigned with an authorized bandwidth not to exceed 11.25 kHz.

(48) Assignment of frequencies in this band are subject to the provisions of § 90.173

(49) This frequency will be authorized a channel bandwidth of 25 kHz.

(50) This frequency is available for systems first licensed prior to August 16, 1995. No new systems will be authorized after August 16, 1995, but prior authorized systems may be modified, expanded, and renewed.

(51) Operation on this frequency is limited to a maximum output power of 1 watt; and each station authorized will be classified and licensed as a mobile station. Any units of such a station, however, may provide the operational functions of a base or fixed station on a secondary basis to mobile service operations, Provided, That the separation between the control point and the center of the radiating portion of the antenna of any units so used does not exceed 8 m (25 ft).

* * * * *

(d) * * *

(4) Low power mobile stations of 100 mw or less output power used for one-way, non-voice medical telemetry operations in hospitals or in medical convalescent centers are subject to the provisions of § 90.238.

* * * * *

(e) * * *

(4) Frequencies in the 25-50 MHz, 150-170 MHz, 450-512 MHz and 902-928 MHz bands may be assigned for the operation of Location and Monitoring Service (LMS) systems in accordance with the provisions of subpart M, notwithstanding this limitation.

* * * * *

16. Section 90.79 is amended by replacing the table of frequencies in paragraph (c), replacing limitation (23), and adding limitations (29), (30), and (31) in paragraph (d), and replacing paragraph (f)(3) to read as follows:

§ 90.79 Manufacturers Radio Service.

* * * * *

(c) * * *

Manufacturers Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Megahertz		
72-76	Operational fixed	25
72.02	Mobile	1, 2
72.04	do	1, 2
72.06	do	1, 2
72.08	do	1, 2, 3
72.10	do	1, 2
72.12	do	1, 2
72.14	do	1, 2
72.16	do	1, 2, 3
72.18	do	1, 2
72.20	do	1, 2
72.22	do	1, 2
72.24	do	1, 2, 3
72.26	do	1, 2
72.28	do	1, 2
72.30	do	1, 2
72.32	do	1, 2, 3
72.34	do	1, 2
72.36	do	1, 2
72.38	do	1, 2
72.40	do	1, 2, 3
72.44	do	2, 4
72.48	do	2, 4
72.52	do	2, 4
72.56	do	2, 4
72.60	do	2, 4
74.61	do	28
74.63	do	28
74.65	do	28
74.67	do	28
74.69	do	28
74.71	do	28
74.73	do	28
74.75	do	28
74.77	do	28
74.79	do	28
75.21	do	28
75.23	do	28
75.25	do	28
75.27	do	28
75.29	do	28
75.31	do	28
75.33	do	28
75.35	do	28
75.37	do	28
75.39	do	28
75.44	do	2, 4
75.48	do	2, 4
75.52	do	2, 4
75.56	do	2, 4
75.60	do	2, 4
150 to 170	Base or mobile	30
153.050	do	5, 21, 22
153.0575	do	5, 21, 22, 23
153.065	do	5
153.0725	do	5, 23
153.080	do	5
153.0875	do	5, 23
153.095	do	5
153.1025	do	5, 23
153.110	do	5
153.1175	do	5, 23
153.125	do	5, 21, 22
153.1325	do	5, 21, 22, 23
153.140	do	5
153.1475	do	5, 23
153.155	do	5
153.1625	do	5, 23
153.170	do	5
153.1775	do	5, 23
153.185	do	5
153.1925	do	5, 23
153.200	do	5
153.2075	do	5, 23
153.215	do	5
153.2225	do	5, 23
153.230	do	5
153.2375	do	5, 23
153.245	do	5
153.2525	do	5, 23
153.260	do	5
153.2675	do	5, 23
153.275	do	5
153.2825	do	5, 23
153.290	do	5
153.2975	do	5, 23
153.305	do	5
153.3125	do	5, 23
153.320	do	5
153.3275	do	5, 23
153.335	do	5, 21
153.3425	do	5, 21, 23
153.350	do	5, 21
153.3575	do	5, 21, 23
153.365	do	5, 21
153.3725	do	5, 21, 23
153.380	do	5, 21

Frequency or band	Class of station(s)	Limitations
153.3875	do	5, 21, 23
153.395	do	5, 21
153.4025	do	5, 21, 23
154.45625	Fixed or mobile	6, 9, 10, 19
154.46375	do	6, 7, 9, 10, 20
154.47125	do	6, 7, 9, 10
154.47875	do	6, 9, 10, 19
158.280	Base or mobile	5
158.2875	do	5, 23
158.295	do	5
158.3025	do	5, 23
158.310	do	5
158.3175	do	5, 23
158.325	do	5, 21, 22
158.3325	do	5, 21, 22, 23
158.415	do	5, 21, 22
158.4225	do	5, 21, 22, 23
158.430	do	5
158.4375	do	5, 23
169-172	Mobile	26
173.20375	Fixed or mobile	6, 7, 9, 10
173.2100	do	7, 8, 9, 10
173.2375	do	6, 9, 10, 19
173.2625	do	6, 9, 10, 19
173.2875	do	6, 9, 10, 19
173.3125	do	6, 9, 10, 19
173.3375	do	6, 9, 10, 19
173.3625	do	6, 9, 10, 19
173.3900	do	7, 8, 9, 10
173.39625	do	6, 7, 9, 10
216-220	Base or mobile	11
220-222	Base and mobile	27
450-470	Fixed, base, or mobile	12, 30
451.1625	Mobile	31
451.175	Base or mobile	13
451.18125	do	13, 29
451.18750	do	13, 23
451.19375	do	13, 29
451.2125	Mobile	31
451.225	Base or mobile	13
451.23125	do	13, 29
451.23750	do	13, 23
451.24375	do	13, 29
451.2625	Mobile	31
451.275	Base or mobile	13
451.28125	do	13, 29
451.28750	do	13, 23
451.29375	do	13, 29
451.3625	Mobile	31
451.375	Base or mobile	13
451.38125	do	13, 29
451.38750	do	13, 23
451.39375	do	13, 29
451.4125	Mobile	31
451.425	Base or mobile	13
451.43125	do	13, 29
451.43750	do	13, 23
451.44375	do	13, 29
451.4625	Mobile	31
451.475	Base or mobile	13
451.48125	do	13, 29
451.48750	do	13, 23
451.49375	do	13, 29
451.5125	Mobile	31
451.525	Base or mobile	13
451.53125	do	13, 29
451.53750	do	13, 23
451.54375	do	13, 29
451.5625	Mobile	31
451.575	Base or mobile	13
451.58125	do	13, 29
451.58750	do	13, 23
451.59375	do	13, 29
451.6125	Mobile	31
451.625	Base or mobile	13
451.63125	do	13, 29
451.63750	do	13, 23
451.64375	do	13, 29
451.6625	Mobile	31
451.675	Base or mobile	13
451.68125	do	13, 29
451.68750	do	13, 23
451.69375	do	13, 29
456.1625	Mobile	31
456.175	do	13
456.18125	do	13, 29
456.18750	do	13, 23
456.19375	do	13, 29
456.2125	do	31
456.225	do	13
456.23125	do	13, 29
456.23750	do	13, 23
456.24375	do	13, 29
456.2625	do	31
456.275	do	13
456.28125	do	13, 29
456.28750	do	13, 23
456.29375	do	13, 29
456.3625	do	31
456.375	do	13
456.38125	do	13, 29
456.38750	do	13, 23
456.39375	do	13, 29
456.4125	do	31
456.425	do	13
456.43125	do	13, 29
456.43750	do	13, 23
456.44375	do	13, 29
456.4625	do	31
456.475	do	13
456.48125	do	13, 29
456.48750	do	13, 23
456.49375	do	13, 29
456.5125	do	31
456.525	do	13
456.53125	do	13, 29
456.53750	do	13, 23
456.54375	do	13, 29
456.5625	do	31
456.575	do	13

Frequency or band	Class of station(s)	Limitations
456.58125	do	13, 29
456.58750	do	13, 23
456.59375	do	13, 29
456.6125	do	31
456.625	do	13
456.63125	do	13, 29
456.63750	do	13, 23
456.64375	do	13, 29
456.6625	do	31
456.675	do	13
456.68125	do	13, 29
456.68750	do	13, 23
456.69375	do	13, 29
462.1875	do	31
462.200	Base or mobile	
462.20625	do	29
462.21250	do	23
462.21875	do	29
462.225	do	
462.23125	do	29
462.23750	do	23
462.24375	do	29
462.250	do	
462.25625	do	29
462.26250	do	23
462.26875	do	29
462.275	do	
462.28125	do	29
462.28750	do	23
462.29375	do	29
462.300	do	
462.30625	do	29
462.31250	do	23
462.31875	do	29
462.325	do	
462.33125	do	29
462.33750	do	23
462.34375	do	29
462.350	do	
462.35625	do	29
462.36250	do	23
462.36875	do	29
462.375	do	
462.38125	do	29
462.38750	do	23
462.39375	do	29
462.400	do	
462.40625	do	29
462.41250	do	23
462.41875	do	29
462.425	do	
462.43125	do	29
462.43750	do	23
462.44375	do	29
462.450	do	
462.45625	do	29
462.46250	do	23
462.46875	do	29
462.475	do	13
462.48125	do	13, 29
462.48750	do	13, 23
462.49375	do	13, 29
462.500	do	
462.50625	do	29
462.51250	do	23
462.51875	do	29
462.525	do	13
462.53125	do	13, 29, 29
467.1875	Mobile	31
467.200	do	
467.20625	do	29
467.21250	do	23
467.21875	do	29
467.225	do	
467.23125	do	29
467.23750	do	23
467.24375	do	29
467.250	do	
467.25625	do	29
467.26250	do	23
467.26875	do	29
467.275	do	
467.28125	do	29
467.28750	do	23
467.29375	do	29
467.300	do	
467.30625	do	29
467.31250	do	23
467.31875	do	29
467.325	do	
467.33125	do	29
467.33750	do	23
467.34375	do	29
467.350	do	
467.35625	do	29
467.36250	do	23
467.36875	do	29
467.375	do	
467.38125	do	29
467.38750	do	23
467.39375	do	29
467.400	do	
467.40625	do	29
467.41250	do	23
467.41875	do	29
467.425	do	
467.43125	do	29
467.43750	do	23
467.44375	do	29
467.450	do	
467.45625	do	29
467.46250	do	23
467.46875	do	29
467.475	do	13
467.48125	do	13, 29
467.48750	do	13, 23
467.49375	do	13, 29
467.500	do	
467.50625	do	29
467.51250	do	23

Frequency or band	Class of station(s)	Limitations
467.51875	do	29
467.525	do	13
467.53125	do	13, 29
470 to 512	Base or mobile	14
806 to 821	Mobile	15
851 to 866	Base or mobile	15
896 to 901	Mobile	15
928 and above	Operational fixed	16
929 to 930	Base only	24
935 to 940	Base or mobile	15
1427 to 1435	Operational fixed, base or mobile	1
2450 to 2500	Base or mobile	17
8400 to 8500	do	18
10,550 to 10,680*	do	

*The frequencies in the band 10.55-10.68 GHz are available for Digital Termination Systems and for associated internodal links in the Point-to-Point Microwave Radio Service. No new licenses will be issued under this Subpart but current licenses will be renewed.

(d) * * *

(23) This frequency is not available in the 150-170 MHz band until August 16, 1996. This frequency will be assigned with an authorized bandwidth not to exceed 11.25 kHz. In the 450-470 MHz band, secondary telemetry operations pursuant to § 90.238(e) will be authorized on this frequency.

* * * * *

(29) This frequency is not available until August 16, 1996. After August 16, 1996 this frequency will be assigned with an authorized bandwidth not to exceed 6 kHz.

(30) Assignment of frequencies in this band are subject to the provisions of § 90.173

(31) This frequency is available for systems first licensed prior to August 16, 1995. No new systems will be authorized after August 16, 1995, but prior authorized systems may be modified, expanded, and renewed.

* * * * *

(f) * * *

(3) Frequencies in the 25-50 MHz, 150-170 MHz, 450-512 MHz and 902-928 MHz bands may be assigned for the operation of Location and Monitoring Service (LMS) systems in accordance with the provisions of subpart M, notwithstanding this limitation.

* * * * *

17. Section 90.81 is amended by replacing the table of frequencies in paragraph (c), replacing limitation (11), and adding limitations (16), (17), and (18) in paragraph (d), and replacing paragraph (f)(3) to read as follows:

§ 90.81 Telephone Maintenance Radio Service.

* * * * *

(c) * * *

Telephone Maintenance Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Kilohertz:		
2,000 to 25,000	Fixed, base or mobile	14
Megahertz:		
35.16	Base or mobile	
43.16	Mobile	
72-76	Operational fixed	13
150 to 170	Base or mobile	17
151.985	Base or mobile	
152.9925	do	16
158.34	Mobile	
158.3475	do	11
169-172	do	15
216 to 220	Base or mobile	2
220-222	Base and mobile	1
450 to 470	Fixed, base, or mobile	3, 17
451.1625	Mobile	18
451.175	Base or mobile	4
451.18125	do	4, 16
451.18750	do	4, 11
451.19375	do	4, 16
451.2125	Mobile	18
451.225	Base or mobile	4
451.23125	do	4, 16
451.23750	do	4, 11
451.24375	do	4, 16
451.2625	Mobile	18
451.275	Base or mobile	4
451.28125	do	4, 16
451.28750	do	4, 11
451.29375	do	4, 16
451.300	do	
451.30625	do	16
451.31250	do	11
451.31875	do	16
451.325	do	
451.33125	do	16
451.33750	do	11
451.34375	do	16
451.350	do	
451.35625	do	16
451.36250	do	11
451.36875	do	16
451.375	do	4
451.38125	do	4, 16
451.38750	do	4, 11
451.39375	do	4, 16
451.400	do	
451.40625	do	16
451.41250	do	11
451.41875	do	16
451.425	do	4
451.43125	do	4, 16
451.43750	do	4, 11
451.44375	do	4, 16
451.450	do	
451.45625	do	16
451.46250	do	11
451.46875	do	16
451.475	do	4
451.48125	do	4, 16
451.48750	do	4, 11
451.49375	do	4, 16
451.500	do	
451.50625	do	16
451.51250	do	11
451.51875	do	16
451.525	do	4
451.53125	do	4, 16
451.53750	do	4, 11
451.54375	do	4, 16
451.5625	Mobile	18
451.575	Base or mobile	4
451.58125	do	4, 16
451.58750	do	4, 11
451.59375	do	4, 16
451.6125	Mobile	18
451.625	Base or mobile	4
451.63125	do	4, 16
451.63750	do	4, 11
451.64375	do	4, 16
451.6625	Mobile	18
451.675	Base or mobile	4
451.68125	do	4, 16
451.68750	do	4, 11
451.69375	do	4, 16
456.1625	Mobile	18
456.175	do	4
456.18125	do	4, 16

Frequency or band	Class of station(s)	Limitations
456.18750	do	4, 11
456.19375	do	4, 16
456.2125	do	18
456.225	do	4
456.23125	do	4, 16
456.23750	do	4, 11
456.24375	do	4, 16
456.2625	do	18
456.275	do	4
456.28125	do	4, 16
456.28750	do	4, 11
456.29375	do	4, 16
456.300	do	5
456.30625	do	5, 16
456.31250	do	5, 11
456.31875	do	5, 16
456.325	do	5
456.33125	do	5, 16
456.33750	do	5, 11
456.34375	do	5, 16
456.350	do	5
456.35625	do	5, 16
456.36250	do	5, 11
456.36875	do	5, 16
456.375	do	4
456.38125	do	4, 16
456.38750	do	4, 11
456.39375	do	4, 16
456.400	do	5
456.40625	do	5, 16
456.41250	do	5, 11
456.41875	do	5, 16
456.425	do	4
456.43125	do	4, 16
456.43750	do	4, 11
456.44375	do	4, 16
456.450	do	5
456.45625	do	5, 16
456.46250	do	5, 11
456.46875	do	5, 16
456.475	do	4
456.48125	do	4, 16
456.48750	do	4, 11
456.49375	do	4, 16
456.500	do	5
456.50625	do	5, 16
456.51250	do	5, 11
456.51875	do	5, 16
456.525	do	4
456.53125	do	4, 16
456.53750	do	4, 11
456.54375	do	4, 16
456.5625	do	18
456.575	do	4
456.58125	do	4, 16
456.58750	do	4, 11
456.59375	do	4, 16
456.6125	do	18
456.625	do	4
456.63125	do	4, 16
456.63750	do	4, 11
456.64375	do	4, 16
456.6625	do	18
456.675	do	4
456.68125	do	4, 16
456.68750	do	4, 11
456.69375	do	4, 16
462.4625	do	18
462.475	Base or mobile	4
462.48125	do	4, 16
462.48750	do	4, 11
462.49375	do	4, 16
462.5125	Mobile	18
462.525	Base or mobile	4
462.53125	do	4, 16
467.4625	Mobile	18
467.475	do	4
467.48125	do	4, 16
467.48750	do	4, 11
467.49375	do	4, 16
467.5125	do	18
467.525	do	4
467.53125	do	4, 16
470 to 512	Base or mobile	6
806 to 821	Mobile	7
851 to 866	Base or mobile	7
896 to 901	Mobile	7
928 and above	Operational fixed	8
929-930	Base only	12
935 to 940	Base or mobile	7
1427 to 1435	Operational fixed, base or mobile	2
2450 to 2500	Base or mobile	9
8400 to 8500	do	10
10,550 to 10,680*	do	

*The frequencies in the band 10.55-10.68 GHz are available for Digital Termination Systems and for associated internodal links in the Point-to-Point Microwave Radio Service. No new licenses will be issued under this Subpart but current licenses will be renewed.

(d) * * *

(11) This frequency is not available in the 150-170 MHz band until August 16, 1996. This frequency will be assigned with an authorized bandwidth not to exceed 11.25 kHz. In the 450-470 MHz band, secondary telemetry operations pursuant to § 90.238(e) will be authorized on this frequency.

* * * * *

(16) This frequency is not available until August 16, 1996. After August 16, 1996 this frequency will be assigned with an authorized bandwidth not to exceed 6 kHz.

(17) Assignment of frequencies in this band are subject to the provisions of § 90.173

(18) This frequency is available for systems first licensed prior to August 16, 1995. No new systems will be authorized after August 16, 1995, but prior authorized systems may be modified, expanded, and renewed.

* * * * *

(f) * * *

(3) Frequencies in the 25-50 MHz, 150-170 MHz, 450-512 MHz and 902-928 MHz bands may be assigned for the operation of Location and Monitoring Service (LMS) systems in accordance with the provisions of subpart M, notwithstanding this limitation.

* * * * *

18. Section 90.89 is amended by replacing the table of frequencies in paragraph (b), replacing limitation (21), and adding limitations (23), (24), and (25) in paragraph (c), and replacing paragraph (e)(2) to read as follows:

§ 90.89 Motor Carrier Radio Service.

* * * * *

(b) * * *

Motor Carrier Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Megahertz:		
30.66	Base or mobile	1, 2
30.74	do	1, 2
30.82	do	1, 2
30.86	do	1, 3
30.90	do	1, 3
30.94	do	1, 3
30.98	do	1, 3
31.02	do	1, 3
31.06	do	1, 3
31.08	do	1
31.10	do	1, 3
31.12	do	1
31.14	do	1, 3
43.70	do	4
43.72	do	4
43.74	do	4
43.76	do	4
43.78	do	4
43.80	do	4
43.82	do	4
43.84	do	4
43.86	do	5, 6
43.88	do	5, 6
43.90	do	5, 6
43.92	do	5, 6
43.94	do	5, 6
43.96	do	5
43.98	do	5
44.00	do	5
44.02	do	5
44.04	do	5
44.06	do	5
44.08	do	5
44.10	do	5, 19
44.12	do	5
44.14	do	5
44.16	do	5
44.18	do	5
44.20	do	5, 20
44.22	do	5
44.24	do	5
44.26	do	5
44.28	do	5
44.30	do	5
44.32	do	5
44.34	do	5
44.36	do	5, 6
44.38	do	5, 6
44.40	do	5, 6
44.42	do	5, 6
44.44	do	5, 6
44.46	do	1
44.48	do	1
44.50	do	1
44.52	do	1
44.54	do	1
44.56	do	1
44.58	do	1
44.60	do	1
72.0-76.0	Operational fixed	7
150 to 170	Base or mobile	24
159.495	do	8
159.5025	do	8, 21
159.510	do	8
159.5175	do	8, 21
159.525	do	8
159.5325	do	8, 21
159.540	do	8
159.5475	do	8, 21
159.555	do	8
159.5625	do	8, 21
159.570	do	8
159.5775	do	8, 21
159.585	do	8
159.5925	do	8, 21
159.600	do	8
159.6075	do	8, 21
159.615	do	8
159.6225	do	8, 21
159.630	do	8
159.6375	do	8, 21
159.645	do	8
159.6525	do	8, 21
159.660	do	8
159.6675	do	8, 21
159.675	do	8
159.6825	do	8, 21
159.690	do	8
159.6975	do	8, 21
159.705	do	8
159.7125	do	8, 21
159.720	do	8
159.7275	do	8, 21
159.735	do	8
159.7425	do	8, 21
159.750	do	8
159.7575	do	8, 21

Frequency or band	Class of station(s)	Limitations
159.765	do	8
159.7725	do	8, 21
159.780	do	8
159.7875	do	8, 21
159.795	do	8
159.8025	do	8, 21
159.810	do	8
159.8175	do	8, 21
159.825	do	8
159.8325	do	8, 21
159.840	do	8
159.8475	do	8, 21
159.855	do	8
159.8625	do	8, 21
159.870	do	8
159.8775	do	8, 21
159.885	do	8
159.8925	do	8, 21
159.900	do	8
159.9075	do	8, 21
159.915	do	8
159.9225	do	8, 21
159.930	do	8
159.9375	do	8, 21
159.945	do	8
159.9525	do	8, 21
159.960	do	8
159.9675	do	8, 21
159.975	do	8
159.9825	do	8, 21
159.990	do	8
159.9975	do	8, 21
160.005	do	8
160.0125	do	8, 21
160.020	do	8
160.0275	do	8, 21
160.035	do	8
160.0425	do	8, 21
160.050	do	8
160.0575	do	8, 21
160.065	do	8
160.0725	do	8, 21
160.080	do	8
160.0875	do	8, 21
160.095	do	8
160.1025	do	8, 21
160.110	do	8
160.1175	do	8, 21
160.125	do	8
160.1325	do	8, 21
160.140	do	8
160.1475	do	8, 21
160.155	do	8
160.1625	do	8, 21
160.170	do	8
160.1775	do	8, 21
160.185	do	8
160.1925	do	8, 21
160.200	do	8
160.2075	do	8, 21

Frequency or band	Class of station(s)	Limitations
169-172	Mobile	17
220-222	Base and mobile	22
450-470	Fixed, base, or mobile	9, 24
452.3125	Mobile	25
452.325	Base or mobile	10
452.33125	do	10, 23
452.33750	do	10, 21
452.34375	do	10, 23
452.3625	Mobile	25
452.375	Base or mobile	10
452.38125	do	10, 23
452.38750	do	10, 21
452.39375	do	10, 23
452.4125	Mobile	25
452.425	Base or mobile	10
452.43125	do	10, 23
452.43750	do	10, 21
452.44375	do	10, 23
452.4625	Mobile	25
452.475	Base or mobile	10
452.48125	do	10, 23
452.48750	do	10, 21
452.49375	do	10, 23
452.6125	Mobile	25
452.625	Base or mobile	
452.63125	do	23
452.63750	do	21
452.64375	do	23
452.650	do	
452.65625	do	23
452.66250	do	21
452.66875	do	23
452.675	do	
452.68125	do	23
452.68750	do	21
452.69375	do	23
452.700	do	
452.70625	do	23
452.71250	do	21
452.71875	do	23
452.725	do	
452.73125	do	23
452.73750	do	21
452.74375	do	23
452.750	do	
452.75625	do	23
452.76250	do	21
452.76875	do	23
452.775	do	10
452.78125	do	10, 23
452.78750	do	10, 21
452.79375	do	10, 23
452.800	do	
452.80625	do	23
452.81250	do	21
452.81875	do	23
452.825	do	10
452.83125	do	10, 23
452.83750	do	10, 21
452.84375	do	10, 23

Frequency or band	Class of station(s)	Limitations
452.850	do	
452.85625	do	23
452.86250	do	21
452.86875	do	23
452.875	do	10
452.88125	do	10, 23
452.88750	do	10, 21
452.89375	do	10, 23
457.3125	Mobile	25
457.325	do	10
457.33125	do	10, 23
457.33750	do	10, 21
457.34375	do	10, 23
457.3625	do	25
457.375	do	10
457.38125	do	10, 23
457.38750	do	10, 21
457.39375	do	10, 23
457.4125	do	25
457.425	do	10
457.43125	do	10, 23
457.43750	do	10, 21
457.44375	do	10, 23
457.4625	do	25
457.475	do	10
457.48125	do	10, 23
457.48750	do	10, 21
457.49375	do	10, 23
457.6125	do	25
457.625	do	
457.63125	do	23
457.63750	do	21
457.64375	do	23
457.650	do	
457.65625	do	23
457.66250	do	21
457.66875	do	23
457.675	do	
457.68125	do	23
457.68750	do	21
457.69375	do	23
457.700	do	
457.70625	do	23
457.71250	do	21
457.71875	do	23
457.725	do	
457.73125	do	23
457.73750	do	21
457.74375	do	23
457.750	do	
457.75625	do	23
457.76250	do	21
457.76875	do	23
457.775	do	10
457.78125	do	10, 23
457.78750	do	10, 21
457.79375	do	10, 23
457.800	do	
457.80625	do	23
457.81250	do	21
457.81875	do	23
457.825	do	10
457.83125	do	10, 23
457.83750	do	10, 21
457.84375	do	10, 23
457.850	do	
457.85625	do	23
457.86250	do	21
457.86875	do	23
457.875	do	10
457.88125	do	10, 23
457.88750	do	10, 21
457.89375	do	10, 23
470 to 512	Base or mobile	11
806 to 821	Mobile	12
851 to 866	Base or mobile	12
896 to 901	Mobile	12
928 and above	Operational fixed	13
929-930	Base only	18
935 to 940	Base or mobile	12
1427 to 1435	Operational fixed, base or mobile	14
2450 to 2500	Base or mobile	15
8400 to 8500	do	16
10,550 to 10,680*	do	

*The frequencies in the band 10.55-10.68 GHz are available for Digital Termination Systems and for associated internodal links in the Point-to-Point Microwave Radio Service. No new licenses will be issued under this Subpart but current licenses will be renewed.

(c) * * *

(21) This frequency is not available in the 150-170 MHz band until August 16, 1996. This frequency will be assigned with an authorized bandwidth not to exceed 11.25 kHz. In the 450-470 MHz band, secondary telemetry operations pursuant to § 90.238(e) will be authorized on this frequency.

* * * * *

(23) This frequency is not available until August 16, 1996. After August 16, 1996 this frequency will be assigned with an authorized bandwidth not to exceed 6 kHz.

(24) Licensing for frequencies in this band are subject to the provisions of § 90.173.

(25) This frequency is available for systems first licensed prior to August 16, 1995. No new systems will be authorized after August 16, 1995, but prior authorized systems may be modified, expanded, and renewed.

* * * * *

(e) * * *

(2) Frequencies in the 25-50, 150-170, 450-512, and 902-928 MHz bands may be assigned for the operation of Location and Monitoring Service (LMS) systems in accordance with the provisions of subpart M, notwithstanding this limitation.

* * * * *

19. Section 90.91 is amended by replacing the table of frequencies in paragraph (b), replacing limitation (18), and adding limitations (22), (23), and (24) in paragraph (c), and replacing paragraph (e)(2) to read as follows:

§ 90.91 Railroad Radio Service.

* * * * *

(b) * * *

Railroad Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Megahertz:		
72.0 to 76.0	Operational fixed	1
72.44	Mobile	2
72.48	do	2
72.52	do	2
72.56	do	2
72.60	do	2
74.61	do	21
74.63	do	21
74.65	do	21
74.67	do	21
74.69	do	21
74.71	do	21
74.73	do	21
74.75	do	21
74.77	do	21
74.79	do	21
75.21	do	21
75.23	do	21
75.25	do	21
75.27	do	21
75.29	do	21
75.31	do	21
75.33	do	21
75.35	do	21
75.37	do	21
75.39	do	21
75.44	do	2
75.48	do	2
75.52	do	2
75.56	do	2
75.60	do	2
150 to 170	Base or mobile	23
160.215	do	3, 4
160.2225	do	3, 4, 18
160.230	do	3, 4
160.2375	do	3, 4, 18
160.245	do	3, 4
160.2525	do	3, 4, 18
160.260	do	3, 4
160.2675	do	3, 4, 18
160.275	do	3, 4
160.2825	do	3, 4, 18
160.290	do	3, 4
160.2975	do	3, 4, 18
160.305	do	3, 4
160.3125	do	3, 4, 18
160.320	do	3, 4
160.3275	do	3, 4, 18
160.335	do	3, 4
160.3425	do	3, 4, 18
160.350	do	3, 4
160.3575	do	3, 4, 18
160.365	do	3, 4
160.3725	do	3, 4, 18
160.380	do	3, 4
160.3875	do	3, 4, 18
160.395	do	3, 4
160.4025	do	3, 4, 18
160.410	do	3, 4, 5
160.4175	do	3, 4, 5, 18
160.425	do	3, 4, 5
160.4325	do	3, 4, 5, 18
160.440	do	3, 4, 5
160.4475	do	3, 4, 5, 18
160.455	do	3, 4, 5
160.4625	do	3, 4, 5, 18
160.470	do	3, 4, 5
160.4775	do	3, 4, 5, 18
160.485	do	3, 4, 5
160.4925	do	3, 4, 5, 18
160.500	do	3, 4, 5
160.5075	do	3, 4, 5, 18
160.515	do	3, 4, 5
160.5225	do	3, 4, 5, 18
160.530	do	3, 4, 5
160.5375	do	3, 4, 5, 18
160.545	do	3, 4, 5
160.5525	do	3, 4, 5, 18
160.560	do	3, 4, 5
160.5675	do	3, 4, 5, 18
160.575	do	3, 4, 5
160.5825	do	3, 4, 5, 18
160.590	do	3, 4, 5
160.5975	do	3, 4, 5, 18
160.605	do	3, 4, 5
160.6125	do	3, 4, 5, 18
160.620	do	3, 4
160.6275	do	3, 4, 18
160.635	do	3, 4
160.6425	do	3, 4, 18
160.650	do	3, 4
160.6575	do	3, 4, 18
160.665	do	3, 4
160.6725	do	3, 4, 18
160.680	do	3, 4
160.6875	do	3, 4, 18
160.695	do	3, 4

Frequency or band	Class of station(s)	Limitations
160.7025	do	3, 4, 18
160.710	do	3, 4
160.7175	do	3, 4, 18
160.725	do	3, 4
160.7325	do	3, 4, 18
160.740	do	3, 4
160.7475	do	3, 4, 18
160.755	do	3, 4
160.7625	do	3, 4, 18
160.770	do	3, 4
160.7775	do	3, 4, 18
160.785	do	3, 4
160.7925	do	3, 4, 18
160.800	do	3, 4
160.8075	do	3, 4, 18
160.815	do	3, 4
160.8225	do	3, 4, 18
160.830	do	3, 4
160.8375	do	3, 4, 18
160.845	do	3, 4
160.8525	do	3, 4, 18
160.860	do	3, 4, 6
160.8675	do	3, 4, 6, 18
160.875	do	3, 4, 6
160.8825	do	3, 4, 6, 18
160.890	do	3, 4, 6
160.8975	do	3, 4, 6, 18
160.905	do	3, 4, 6
160.9125	do	3, 4, 6, 18
160.920	do	3, 4, 6
160.9275	do	3, 4, 6, 18
160.935	do	3, 4, 6
160.9425	do	3, 4, 6, 18
160.950	do	3, 4, 6
160.9575	do	3, 4, 6, 18
160.965	do	3, 4, 6
160.9725	do	3, 4, 6, 18
160.980	do	3, 4, 6
160.9875	do	3, 4, 6, 18
160.995	do	3, 4, 6
161.0025	do	3, 4, 6, 18
161.010	do	3, 4, 6
161.0175	do	3, 4, 6, 18
161.025	do	3, 4, 6
161.0325	do	3, 4, 6, 18
161.040	do	3, 4, 6
161.0475	do	3, 4, 6, 18
161.055	do	3, 4, 6
161.0625	do	3, 4, 6, 18
161.070	do	3, 4, 6
161.0775	do	3, 4, 6, 18
161.085	do	3, 4, 6
161.0925	do	3, 4, 6, 18
161.100	do	3, 4, 6
161.1075	do	3, 4, 6, 18
161.115	do	3, 4, 6
161.1225	do	3, 4, 6, 18
161.130	do	3, 4, 6
161.1375	do	3, 4, 6, 18
161.145	do	3, 4, 6
161.1525	do	3, 4, 6, 18
161.160	do	3, 4, 6
161.1675	do	3, 4, 6, 18
161.175	do	3, 4, 6
161.1825	do	3, 4, 6, 18
161.190	do	3, 4, 6
161.1975	do	3, 4, 6, 18
161.205	do	3, 4, 6
161.2125	do	3, 4, 6, 18
161.220	do	3, 4, 6
161.2275	do	3, 4, 6, 18
161.235	do	3, 4, 6
161.2425	do	3, 4, 6, 18
161.250	do	3, 4, 6
161.2575	do	3, 4, 6, 18
161.265	do	3, 4, 6
161.2725	do	3, 4, 6, 18
161.280	do	3, 4, 6
161.2875	do	3, 4, 6, 18
161.295	do	3, 4, 6
161.3025	do	3, 4, 6, 18
161.310	do	3, 4, 6
161.3175	do	3, 4, 6, 18
161.325	do	3, 4, 6
161.3325	do	3, 4, 6, 18
161.340	do	3, 4, 6
161.3475	do	3, 4, 6, 18
161.355	do	3, 4, 6
161.3625	do	3, 4, 6, 18
161.370	do	3, 4, 6
161.3775	do	3, 4, 6, 18
161.385	do	3, 4, 7
161.3925	do	3, 4, 7, 18
161.400	do	3, 4, 7
161.4075	do	3, 4, 7, 18
161.415	do	3, 4, 7
161.4225	do	3, 4, 7, 18
161.430	do	3, 4, 7
161.4375	do	3, 4, 7, 18
161.445	do	3, 4, 7
161.4525	do	3, 4, 7, 18
161.460	do	3, 4, 7
161.4675	do	3, 4, 7, 18
161.475	do	3, 4, 7
161.4825	do	3, 4, 7, 18
161.490	do	3, 4, 7
161.4975	do	3, 4, 7, 18
161.505	do	3, 4, 7
161.5125	do	3, 4, 7, 18
161.520	do	3, 4, 7
161.5275	do	3, 4, 7, 18
161.535	do	3, 4, 7
161.5425	do	3, 4, 7, 18
161.550	do	3, 4, 7
161.5575	do	3, 4, 7, 18
161.565	do	3, 4, 7
169 to 172	Mobile, operational fixed	8
220-222	Base and mobile	20
406 to 413	Operational fixed	8
450 to 470	Fixed, base, or mobile	9, 23

Frequency or band	Class of station(s)	Limitations
452.3125	Mobile	24
452.325	Base or mobile	10
452.33125	do	10, 22
452.33750	do	10, 18
452.34375	do	10, 22
452.3625	Mobile	24
452.375	Base or mobile	10
452.38125	do	10, 22
452.38750	do	10, 18
452.39375	do	10, 22
452.4125	Mobile	24
452.425	Base or mobile	10
452.43125	do	10, 22
452.43750	do	10, 18
452.44375	do	10, 22
452.4625	Mobile	24
452.475	Base or mobile	10
452.48125	do	10, 22
452.48750	do	10, 18
452.49375	do	10, 22
452.7625	Mobile	24
452.775	Base or mobile	10
452.78125	do	10, 22
452.78750	do	10, 18
452.79375	do	10, 22
452.8125	Mobile	24
452.825	Base or mobile	10
452.83125	do	10, 22
452.83750	do	10, 18
452.84375	do	10, 22
452.8625	Mobile	24
452.875	Base or mobile	10
452.88125	do	10, 22
452.88750	do	10, 18
452.89375	do	10, 22
452.900	do	
452.90625	do	22
452.91250	do	18
452.91875	do	22
452.925	do	11
452.93125	do	11, 22
452.93750	do	11, 18
452.94375	do	11, 22
452.950	do	11
452.95625	do	11, 22
452.96250	do	11, 18
452.96875	do	11, 22
457.3125	Mobile	24
457.325	do	10
457.33125	do	10, 22
457.33750	do	10, 18
457.34375	do	10, 22
457.3625	do	24
457.375	do	10
457.38125	do	10, 22
457.38750	do	10, 18
457.39375	do	10, 22
457.4125	do	24
457.425	do	10
457.43125	do	10, 22
457.43750	do	10, 18
457.44375	do	10, 22
457.4625	do	24
457.475	do	10
457.48125	do	10, 22
457.48750	do	10, 18
457.49375	do	10, 22
457.7625	do	24
457.775	do	10
457.78125	do	10, 22
457.78750	do	10, 18
457.79375	do	10, 22
457.8125	do	24
457.825	do	10
457.83125	do	10, 22
457.83750	do	10, 18
457.84375	do	10, 22
457.8625	do	24
457.875	do	10
457.88125	do	10, 22
457.88750	do	10, 18
457.89375	do	10, 22
457.900	do	
457.90625	do	22
457.91250	do	18
457.91875	do	22
457.925	do	11
457.93125	do	11, 22
457.93750	do	11, 18
457.94375	do	11, 22
457.950	do	11
457.95625	do	11, 22
457.96250	do	11, 18
457.96875	do	11, 22
470 to 512	Base or mobile	12
806 to 821	Mobile	13
851 to 866	Base or mobile	13
896 to 901	Mobile	13
928 and above	Operational fixed	14
929-930	Base only	19
935 to 940	Base or mobile	13
1427 to 1435	Operational fixed, base or mobile	15
2450 to 2500	Base or mobile	16
8400 to 8500	do	17
10,550 to 10,680*	do	

*The frequencies in the band 10.55-10.68 GHz are available for Digital Termination Systems and for associated intermodal links in the Point-to-Point Microwave Radio Service. No new licenses will be issued under this Subpart but current licenses will be renewed.

(c) * * *

(18) This frequency is not available in the 150-170 MHz band until August 16, 1996. This frequency will be assigned with an authorized bandwidth not to exceed 11.25 kHz. In the 450-470 MHz band, secondary telemetry operations pursuant to § 90.238(e) will be authorized on this frequency.

* * * * *

(22) This frequency is not available until August 16, 1996. After August 16, 1996 this frequency will be assigned with an authorized bandwidth not to exceed 6 kHz.

(23) Assignment of frequencies in this band are subject to the provisions of § 90.173

(24) This frequency is available for systems first licensed prior to August 16, 1995. No new systems will be authorized after August 16, 1995, but prior authorized systems may be modified, expanded, and renewed.

* * * * *

(e) * * *

(2) Frequencies in the 25-50 MHz, 150-170 MHz, 450-512 MHz and 902-928 MHz bands may be assigned for the operation of Location and Monitoring Service (LMS) systems in accordance with the provisions of subpart M, notwithstanding this limitation.

* * * * *

20. Section 90.93 is amended by replacing the table of frequencies in paragraph (b), replacing limitation (15), and adding limitations (21), (22), and (23) in paragraph (c), and replacing paragraph (d)(2) to read as follows:

§ 90.93 Taxicab Radio Service.

* * * * *

(b) * * *

Taxicab Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Megahertz:		
72-76	Operational fixed	14
150 to 170	Base or mobile	22
152.2625	Base or mobile	21
152.270	do	
152.2775	do	15
152.285	do	
152.2925	do	15
152.300	do	1, 2
152.3075	do	1, 2, 15
152.315	do	1, 2
152.3225	do	1, 2, 15
152.330	do	
152.3375	do	15
152.345	do	1, 2
152.3525	do	1, 2, 15
152.360	do	1, 2
152.3675	do	1, 2, 15
152.375	do	1, 2
152.3825	do	1, 2, 15
152.390	do	
152.3975	do	15
152.405	do	1, 2
152.4125	do	1, 2, 15
152.420	do	1, 2
152.4275	do	1, 2, 15
152.435	do	
152.4425	do	15
152.450	do	
152.4575	do	15
152.465	do	11
157.530	Mobile	
157.5375	do	15
157.545	do	
157.5525	do	15
157.560	do	1, 2
157.5675	do	1, 2, 15
157.575	do	1, 2
157.5825	do	1, 2, 15
157.590	do	
157.5975	do	15
157.605	do	1, 2
157.6125	do	1, 2, 15
157.620	do	1, 2
157.6275	do	1, 2, 15
157.635	do	1, 2
157.6425	do	1, 2, 15
157.650	do	
157.6575	do	15
157.665	do	1, 2
157.6725	do	1, 2, 15
157.680	do	1, 2
157.6875	do	1, 2, 15
157.695	do	
157.7025	do	15
157.710	do	
157.7175	do	15
157.725	do	11
169-172	do	12
220-222	Base and mobile	16
450 to 470	Fixed, base, or mobile	3, 22
452.0375	Mobile	23
452.050	Base or mobile	
452.05625	do	21
452.06250	do	15
452.06875	do	21
452.0875	Mobile	23
452.100	Base or mobile	10
452.10625	do	10, 21
452.11250	do	10, 15
452.11875	do	10, 21
452.1375	Mobile	23
452.150	Base or mobile	
452.15625	do	21
452.16250	do	15
452.16875	do	21
452.1875	Mobile	23
452.200	Base or mobile	10
452.20625	do	10, 21
452.21250	do	10, 15
452.21875	do	10, 21
452.225	do	10
452.23125	do	10, 21
452.23750	do	10, 15
452.24375	do	10, 21
452.250	do	10
452.25625	do	10, 21
452.26250	do	10, 15
452.26875	do	10, 21
452.275	do	10
452.28125	do	10, 21
452.28750	do	10, 15
452.29375	do	10, 21
452.300	do	
452.30625	do	21
452.31250	do	15
452.31875	do	21
452.3375	Mobile	23

Frequency or band	Class of station(s)	Limitations
452.350	Base or mobile	10
452.35625	do	10, 21
452.36250	do	10, 15
452.36875	do	10, 21
452.3875	Mobile	23
452.400	Base or mobile	10
452.40625	do	10, 21
452.41250	do	10, 15
452.41875	do	10, 21
452.4375	Mobile	23
452.450	Base or mobile	10
452.45625	do	10, 21
452.46250	do	10, 15
452.46875	do	10, 21
452.4875	Mobile	23
452.500	Base or mobile	
452.50625	do	21
452.51250	do	15
452.51875	do	21
457.0375	Mobile	23
457.050	do	
457.05625	do	21
457.06250	do	15
457.06875	do	21
457.0875	do	23
457.100	do	10
457.10625	do	10, 21
457.11250	do	10, 15
457.11875	do	10, 21
457.1375	do	23
457.150	do	
457.15625	do	21
457.16250	do	15
457.16875	do	21
457.1875	do	23
457.200	do	10
457.20625	do	10, 21
457.21250	do	10, 15
457.21875	do	10, 21
457.225	do	10
457.23125	do	10, 21
457.23750	do	10, 15
457.24375	do	10, 21
457.250	do	10
457.25625	do	10, 21
457.26250	do	10, 15
457.26875	do	10, 21
457.275	do	10
457.28125	do	10, 21
457.28750	do	10, 15
457.29375	do	10, 21
457.300	do	
457.30625	do	21
457.31250	do	15
457.31875	do	21
457.3375	do	23
457.350	do	10
457.35625	do	10, 21
457.36250	do	10, 15
457.36875	do	10, 21
457.3875	do	23
457.400	do	10
457.40625	do	10, 21
457.41250	do	10, 15
457.41875	do	10, 21
457.4375	do	23
457.450	do	10
457.45625	do	10, 21
457.46250	do	10, 15
457.46875	do	10, 21
457.4875	do	23
457.500	do	
457.50625	do	21
457.51250	do	15
457.51875	do	21
470-512	Base or mobile	4
806 to 821	Mobile	5
851 to 866	Base or mobile	5
896 to 901	Mobile	5
928 and above	Operational fixed	6
929-930	Base only	13
935 to 940	Base or mobile	5
1427 to 1435	Base, mobile, or operational fixed	7
2450 to 2500	Base or mobile	8
8400 to 8500	do	9
10,550 to 10,680*	do	

*The frequencies in the band 10.55-10.68 GHz are available for Digital Termination Systems and for associated internodal links in the Point-to-Point Microwave Radio Service. No new licenses will be issued under this Subpart but current licenses will be renewed.

(c) * * *

(15) This frequency is not available in the 150-170 MHz band until August 16, 1996. This frequency will be assigned with an authorized bandwidth not to exceed 11.25 kHz. In the 450-470 MHz band, secondary telemetry operations pursuant to § 90.238(e) will be authorized on this frequency.

* * * * *

(21) This frequency is not available until August 16, 1996. After August 16, 1996 this frequency will be assigned with an authorized bandwidth not to exceed 6 kHz.

(22) Assignment of frequencies in this band are subject to the provisions of § 90.173

(23) This frequency is available for systems first licensed prior to August 16, 1995. No new systems will be authorized after August 16, 1995, but prior authorized systems may be modified, expanded, and renewed.

* * * * *

(d) * * *

(2) Frequencies in the 25-50 MHz, 150-170 MHz, 450-512 MHz and 902-928 MHz bands may be assigned for the operation of Location and Monitoring Service (LMS) systems in accordance with the provisions of subpart M, notwithstanding this limitation.

* * * * *

21. Section 90.95 is amended by replacing the table of frequencies in paragraph (c), revising limitations (2) and (6), replacing limitation (18), and adding limitations (20), (21), (22), and (23) in paragraph (d), and replacing paragraph (e)(2) to read as follows:

§ 90.95 Automobile Emergency Radio Service.

* * * * *

(c) * * *

Automobile Emergency Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Megahertz:		
72-76	Operational fixed	16
150 to 170	Base or mobile	21
150.815	do	1, 2, 3
150.830	do	1, 2, 3, 22
150.845	do	1, 2, 3
150.8525	do	1, 2, 3, 18
150.860	do	1, 2, 3
150.8675	do	1, 2, 3, 18
150.875	do	1, 2, 3
150.8825	do	1, 2, 3, 18
150.890	do	1, 2, 3
150.8975	do	1, 2, 3, 18
150.905	do	3, 4
150.920	do	3, 4, 22
150.935	do	3, 4
150.9425	do	3, 4, 18
150.950	do	3, 4
150.9575	do	3, 4, 18
150.965	do	3, 4
150.9725	do	3, 4, 18
157.470	do	5, 6
157.4775	do	5, 6, 18
157.485	do	5, 6
157.4925	do	5, 6, 18
157.500	do	5, 6
157.5075	do	5, 6, 18
157.515	do	5, 6
157.5225	do	5, 6, 18
169-172	Mobile	17
220-222	Base and mobile	19
450 to 470	Fixed, base, or mobile	7, 21
452.5125	Mobile	23
452.525	Base or mobile	8
452.53125	do	8, 20
452.53750	do	8, 18
452.54375	do	8, 20
452.550	do	8
452.55625	do	8, 20
452.56250	do	8, 18
452.56875	do	8, 20
452.575	do	8
452.58125	do	8, 20
452.58750	do	8, 18
452.59375	do	8, 20
452.600	do	8
452.60625	do	8, 20
452.61250	do	8, 18
452.61875	do	8, 20
470 to 512	do	9
806 to 821	Mobile	10
851 to 866	Base or mobile	10
896 to 901	Mobile	10
928 and above	Operational fixed	11
929-930	Base only	15
935 to 940	Base or mobile	10
1427 to 1435	Operational fixed, base, or mobile	12
2450 to 2500	Base or mobile	13
8400 to 8500	do	14
10,550 to 10,680*	do	

* The frequencies in the band 10.55-10.68 GHz are available for Digital Termination Systems and for associated intermodal links in the Point-to-Point Microwave Radio Service. No new licenses will be issued under this subpart but current licenses will be renewed.

(d) * * *

(2) Only one of the frequencies 150.815, 150.8225, 150.830, 150.8375, 150.845, 150.8525, 150.860, 150.8675, 150.875, 150.8825, 150.890, or 150.8975 MHz may be assigned to the same licensee in a given area.

* * * * *

(6) Only one of the frequencies 157.470, 157.4775, 157.485, 157.4925, 157.500, 157.5075, 157.515, or 157.5225 MHz may be assigned to the same licensee in a given area.

* * * * *

(18) This frequency is not available in the 150-170 MHz band until August 16, 1996. This frequency will be assigned with an authorized bandwidth not to exceed 11.25 kHz. In the 450-470 MHz band, secondary telemetry operations pursuant to § 90.238(e) will be authorized on this frequency.

* * * * *

(20) This frequency is not available until August 16, 1996. After August 16, 1996 this frequency will be assigned with an authorized bandwidth not to exceed 6 kHz.

(21) Assignment of frequencies in this band are subject to the provisions of § 90.173

(22) This frequency will be authorized a channel bandwidth of 25 kHz.

(23) This frequency is available for systems first licensed prior to August 16, 1995. No new systems will be authorized after August 16, 1995, but prior authorized systems may be modified, expanded, and renewed.

* * * * *

(e) * * *

(2) Frequencies in the 25-50 MHz, 150-170 MHz, 450-512 MHz and 902-928 MHz bands may be assigned for the operation of Location and Monitoring Service (LMS) systems in accordance with the provisions of subpart M, notwithstanding this limitation.

* * * * *

22. Section 90.173 is amended by revising paragraph (f) and adding paragraphs (l) and (m) to read as follows:

§ 90.173 Policies governing the assignment of frequencies.

* * * * *

(f) After August 16, 1995, applications for stations in the 150-174 MHz and 421-512 MHz bands for operation on frequencies 15 kHz or less removed from existing stations in the same geographic area will be granted based upon a recommendation from the applicable frequency coordinator.

* * * * *

(l) In the 150-174 MHz band, authorizations for frequencies available prior to August 16, 1995 will be granted with channel bandwidths of 25 kHz or less. After August 16, 1995, authorizations for all other frequencies in this band will be granted with channel bandwidths of 12.5 kHz or less.

(m) In the 421-512 MHz band, authorizations for frequencies available prior to August 16, 1995 will be granted with channel bandwidths of 25 kHz or less. After August 16, 1995, new authorizations for frequencies 12.5 kHz removed from these frequencies will be made for channel bandwidths of 12.5 kHz or less, and authorizations for frequencies 6.25 kHz removed from these frequencies will be granted with channel bandwidths of 6.25 kHz or less.

* * * * *

23. Section 90.175 is amended by revising paragraph (a) to read as follows:

§ 90.175 Frequency coordination requirements.

* * * * *

(a) For frequencies between 25 and 470 MHz: A statement from the applicable frequency coordinator recommending the most appropriate frequency. The coordinator's recommendation may include comments on technical factors such as power, antenna height and gain, terrain and other factors which may serve to minimize potential interference. Until August 16, 1995, for PLMR frequencies between 150 and 470 MHz, the coordinator: (1) must not recommend any adjacent channel frequency 15 kHz or less removed to existing stations which would result in a separation of less than 16 km (10 mi), or 12 km (7 mi) in the Taxicab Radio Service, unless written concurrence is received from the licensee of such station(s); and (2) if the frequency recommended is in the 150 - 170 MHz band, and is 17.5 kHz or less removed from frequency which is available to another radio service, the

coordinators statement must show that approval has been received from the coordinator for the other service. Frequencies in the 450 - 470 MHz band, when used for secondary fixed operations, shall be assigned and coordinated pursuant to § 90.261.

* * * * *

24. Section 90.203 is amended by adding paragraph (j) to read as follows:

§ 90.203 Type acceptance.

* * * * *

(j) For transmitters operating on frequencies in the 150-174 MHz and 421-512 MHz bands:

(1) Prior to August 1, 1996, type acceptance will be granted for equipment with channel bandwidths up to 25 kHz.

(2) On or after August 1, 1996, type acceptance will only be granted for equipment with the following channel bandwidths:

(i) 12.5 kHz or less for single bandwidth mode equipment or multi-bandwidth mode equipment with a maximum channel bandwidth of 12.5 kHz.

(ii) 25 kHz for multi-bandwidth mode equipment with a maximum channel bandwidth of 25 kHz if it is capable of operating on channels of 12.5 kHz or less.

(iii) 25 kHz if the equipment meets the efficiency standard of paragraph (j)(3) of this section.

(3) On or after August 1, 1996, requests for Part 90 type acceptance of transmitters designed to operate on frequencies in the 150-174 MHz and 421-512 MHz bands must include a certification that the equipment meets a spectrum efficiency standard of one voice channel per 12.5 kHz of channel bandwidth. If the equipment is capable of transmitting data and has an overall bandwidth of 6.25 kHz or more, the equipment must be capable of supporting a minimum data rate of 4800 bits per second per 6.25 kHz of bandwidth.

(4) On or after January 1, 2005, except for hand-held transmitters with an output power of two watts or less, type acceptance will only be granted for equipment with the following channel bandwidths:

(i) 6.25 kHz or less for single bandwidth mode equipment.

(ii) 12.5 kHz for multi-bandwidth mode equipment with a maximum channel bandwidth of 12.5 kHz if it is capable of operating on channels of 6.25 kHz or less.

(iii) 25 kHz for multi-bandwidth mode equipment with a maximum channel bandwidth of 25 kHz if it is capable of operating on channels of 6.25 kHz or less.

(iv) Up to 25 kHz if the equipment meets the efficiency standard of paragraph (j)(5) of this section.

(5) On or after January 1, 2005, requests for Part 90 type acceptance of transmitters designed to operate on frequencies in the 150-174 MHz and 421-512 MHz bands must include a certification that the equipment meets a spectrum efficiency standard of one voice channel per 6.25 kHz of channel bandwidth. If the equipment is capable of transmitting data and has an overall bandwidth of 6.25 kHz or more, the equipment must be capable of supporting a minimum data rate of 4800 bits per second per 6.25 kHz of bandwidth.

(6) The Commission's Equipment Authorization Division will not accept applications for modification or permissive changes of Type Acceptance grants for single bandwidth mode transmitters designed to operate on channel bandwidths wider than 12.5 kHz granted prior to August 1, 1996, except under the following conditions:

(i) Transmitters that have the inherent capability for multi-mode or narrowband operation allowed in paragraph (j)(2) and (j)(4), may have their grant of Type Acceptance modified upon demonstrating that the original unit complies with the technical requirements for operation.

(ii) New FCC Identifiers will be needed to identify modified equipment that complies with the requirements of (j)(2) and (j)(4).

(7) Transmitters designed for one-way paging operations will be type accepted with a 25 kHz channel bandwidth.

25. Section 90.205 is revised to read as follows:

§ 90.205 Power and antenna height limits.

Applicants for licenses must request and use no more power than the actual power necessary for satisfactory operation. Except where otherwise specifically provided for, the maximum power that will be authorized for new stations authorized after August 16, 1995 is as follows:

(a) Below 25 MHz. For single sideband operations (J3E emission), the maximum transmitter peak envelope power is 1000 watts.

(b) 25-50 MHz. The maximum transmitter output power is 300 watts.

(c) 72-76 MHz. The maximum effective radiated power (ERP) for stations operating on fixed frequencies is 300 watts. Stations operating on mobile-only frequencies are limited to one watt transmitter output power.

(d) 150-174 MHz.

(1) The maximum allowable station ERP is dependent upon the station's antenna HAAT and required service area and will be authorized in accordance with Table 1. Applicants requesting an ERP in excess of that listed in Table 1 must submit an engineering analysis based upon generally accepted engineering practices and standards that includes coverage contours to demonstrate that the requested station parameters will not produce coverage in excess of that which the applicant requires.

(2) Applications for stations with ERPs higher than permitted in Table 1 will be submitted to the frequency coordinator accompanied by an technical analysis, based upon generally accepted engineering practices and standards, that demonstrates that the requested station parameters will not produce a signal strength in excess of 37 dBu at any point along the edge of the requested service area. The coordinator may then recommend any ERP appropriate to meet this condition.

(3) An applicant for a station with a service area radius greater than 40 km (25 mi) must justify the requested service area radius, which will be authorized only in accordance with Table 1, note 4. Base stations with a service area radius greater than 80 km (50 mi) will be authorized only on a secondary basis.

Table 1 — 150-174 MHz - Maximum ERP/Reference HAAT for a Specific Service Area Radius

Service area radius (km)	3	8	13	16	24	32	40	48[4]	64[4]	80[4]
Maximum ERP (w) [1]	1	28	178	500[2]	500[2]	500[2]	500[2]	500[2]	500[2]	500[2]
Up to reference HAAT (m)[3]	15	15	15	15	33	65	110	160	380	670

[1] Maximum ERP indicated provides for a 37 dBu signal strength at the edge of the service area per FCC Report R-6602, Fig. 19 (See § 73.699, Fig. 10).

[2] Maximum ERP of 500 watts allowed. Signal strength at the service area contour may be less than 37 dBu.

[3] When the actual antenna HAAT is greater than the reference HAAT, the allowable ERP will be reduced in accordance with the following equation: $ERP_{allow} = ERP_{max} \times (HAAT_{ref} / HAAT_{actual})^2$.

[4] Applications for this service area radius may be granted upon specific request with justification and must include a technical demonstration that the signal strength at the edge of the service area does not exceed 37 dBu.

(e) 220-222 MHz. Limitations on power and antenna heights are specified in § 90.729.

(f) 421-430 MHz. Limitations on power and antenna heights are specified in § 90.279.

(g) 450-470 MHz.

(1) The maximum allowable station effective radiated power (ERP) is dependent upon the station's antenna HAAT and required service area and will be authorized in accordance with Table 2. Applicants requesting an ERP in excess of that listed in Table 2 must submit an engineering analysis based upon generally accepted engineering practices and standards that includes coverage contours to demonstrate that the requested station parameters will not produce coverage in excess of that which the applicant requires.

(2) Applications for stations with ERPs higher than permitted in Table 2 will be submitted to the frequency coordinator accompanied by an technical analysis, based upon

generally accepted engineering practices and standards, that demonstrates that the requested station parameters will not produce a signal strength in excess of 39 dBu at any point along the edge of the requested service area. The coordinator may then recommend any ERP appropriate to meet this condition.

(3) An applicant for a station with a service area radius greater than 32 km (20 mi) must justify the requested service area radius, which may be authorized only in accordance with Table 2, note 4. Base stations with a service area radius greater than 80 km (50 mi) will be authorized only on a secondary basis.

Table 2 — 450-470 MHz - Maximum ERP/Reference HAAT for a Specific Service Area Radius

Service area radius (km)	3	8	13	16	24	32	40[4]	48[4]	64[4]	80[4]
Maximum ERP (w) [1]	2	100	500[2]	500[2]	500[2]	500[2]	500[2]	500[2]	500[2]	500[2]
Up to reference HAAT (m)[3]	15	15	15	27	63	125	250	410	950	2700

[1] Maximum ERP indicated provides for a 39 dBu signal strength at the edge of the service area per FCC Report R-6602, Fig. 29 (See § 73.699, Fig. 10 b).

[2] Maximum ERP of 500 watts allowed. Signal strength at the service area contour may be less than 39 dBu.

[3] When the actual antenna HAAT is greater than the reference HAAT, the allowable ERP will be reduced in accordance with the following equation:
$ERP_{allow} = ERP_{max} \times (HAAT_{ref} / HAAT_{actual})^2$.

[4] Applications for this service area radius may be granted upon specific request with justification and must include a technical demonstration that the signal strength at the edge of the service area does not exceed 39 dBu.

(h) 470-512 MHz. Power and height limitations are specified in §§ 90.307 and 90.309.

(j) 806-824/851-869 MHz and 896-901/935-940 MHz. Power and height limitations are specified in § 90.635.

(k) 902-928 MHz. LMS systems operating pursuant to Subpart M of this part in the 902-927.25 MHz band will be authorized a maximum of 30 watts ERP. LMS equipment operating in the 927.25-928 MHz band will be authorized a maximum of 300 watts ERP. ERP must be measured as peak envelope power. Antenna heights will be as specified in § 90.353(h).

(l) Above 928 MHz.

26. Section 90.207 is amended by replacing the introductory text, adding a new paragraph (a), redesignating existing paragraphs (a) through (l) as (b) through (m), and adding paragraph (n) to read as follows:

§ 90.207 Types of emissions.

Unless specified elsewhere in this part, stations will be authorized emissions as provided for in the following paragraphs. For a complete listing of emission symbols see § 2.201 of the Commissions's rules 47 C.F.R. § 2.201.

(a) Explanation of emission symbols.

The first symbol indicates the type of modulation on the transmitter carrier.

A - Amplitude modulation, double sideband with identical information on each sideband.
F - Frequency modulation
G - Phase modulation.
J - Single sideband with suppressed carrier.
P - Unmodulated pulse.

The second symbol indicates the type of signal modulating the transmitter carrier.

0 - No modulation.
1 - Digital modulation, no subcarrier.
2 - Digital modulation, modulated subcarrier.
3 - Analog modulation.

The third symbol indicates the type of transmitted information.

A - Telegraphy for aural reception.
B - Telegraphy for machine reception.
C - Facsimile
D - Data, telemetry, and telecommand.
E - Voice.
N - No transmitted information.

(b) - (m) * * *

(n) Other emissions. Requests for emissions other than those listed in paragraphs (c) through (e) of this section will be considered on a case-by-case basis to ensure that the requested emission will not cause more interference than other currently permitted emissions.

27. Section 90.209 is revised to read as follows:

§ 90.209 Bandwidth limitations.

(a) Each authorization issued to a station licensed under this part will show an emission designator representing the class of emission authorized. The designator will be prefixed by a specified necessary bandwidth. This number does not necessarily indicate the bandwidth occupied by the emission at any instant. In those cases where § 2.202 of Part 2 of this chapter does not provide a formula for the computation of necessary bandwidth, the occupied bandwidth, as defined in Part 2, may be used in lieu of the necessary bandwidth.

(b) The maximum authorized single channel bandwidth of emission corresponding to the type of emission specified in § 90.207 of this part is as follows:

(1) For A1A or A1B emissions, the maximum authorized bandwidth is 0.25 kHz. The maximum authorized bandwidth for type A3E emission is 8 kHz.

(2) For operations below 25 MHz utilizing J3E emission, the bandwidth occupied by the emission shall not exceed 3000 Hz. The assigned frequency will be specified in the authorization. The authorized carrier frequency will be 1400 Hz lower in frequency than the assigned frequency. Only upper sideband emission may be used. In the case of regularly available double sideband radiotelephone channels, an assigned frequency for J3E emissions is available either 1600 Hz below or 1400 Hz above the double sideband radiotelephone assigned frequency.

(3) For all other types of emissions, the maximum authorized bandwidth shall not be more than that normally authorized for voice operations

(4) Where a frequency is assigned exclusively to a single licensee, more than a single emission may be used within the authorized bandwidth. In such cases, the frequency stability requirements of § 90.213 must be met for each emission.

(5) Unless specified elsewhere, channel spacings and bandwidths that will be authorized in the following frequency bands are given in the following Table.

Standard Channel Spacing/Bandwidth

Frequency Band (MHz)	Channel Spacing (kHz)	Authorized Bandwidth (kHz)
Below 25 [2]	--	--
25 - 50	20	20
72 - 76	20	20
150 - 174	7.5 [1]	25/11.25/6 [1, 3]
220 - 222	5	4
421 - 512 [2]	6.25 [1]	25/11.25/6 [1, 3]
806 - 821/851 - 866	25	20
821 - 824/866 - 869	12.5	20
896 - 901/935 - 940	12.5	13.6
902-928 [4]	--	--
929 - 930	25	20
1427 - 1435 [2]	--	--

Frequency Band (MHz)	Channel Spacing (kHz)	Authorized Bandwidth (kHz)
2450 - 2483.5 [2]	--	--
Above 2500 [2]	--	--

[1] For stations authorized on or after August 16, 1995.

[2] Bandwidths for radiolocation stations in the 420-450 MHz band and for stations operating in bands subject to this footnote will be reviewed and authorized on a case-by-case basis.

[3] Operations using equipment designed to operate with a 25 kHz channel bandwidth will be authorized a 20 kHz bandwidth. Operations using equipment designed to operate with a 12.5 kHz channel bandwidth will be authorized a 11.25 kHz bandwidth. Operations using equipment designed to operate with a 6.25 kHz channel bandwidth will be authorized a 6 kHz bandwidth.

[4] The maximum authorized bandwidth shall be 12 MHz for non-multilateration LMS operations in the band 909.75-921.75 MHz and 2 MHz in the band 902.00-904.00 MHz. The maximum authorized bandwidth for multilateration LMS operations shall be 5.75 MHz in the 904.00-909.75 MHz band; 2 MHz in the 919.75-921.75 MHz band; 5.75 MHz in the 921.75-927.25 MHz band and its associated 927.25-927.50 MHz narrowband forward link; and 8.00 MHz if the 919.75-921.75 MHz and 921.75-927.25 MHz bands and their associated 927.25-927.50 MHz and 927.50-927.75 MHz narrowband forward links are aggregated.

* * * * *

28. Section 90.210 is added to read as follows:

§ 90.210 Emission masks.

(a) Except as indicated elsewhere in this part, transmitters used in the radio services governed by this part must comply with the emission masks outlined in this section. Unless otherwise stated, per paragraphs (d)(4), (e)(4), and (l) of this section, measurements of emission power can be expressed in either peak or average values provided that emission powers are expressed with the same parameters used to specify the unmodulated transmitter carrier power. For transmitters that do not produce a full power unmodulated carrier, reference to the unmodulated transmitter carrier power refers to the total power contained in the channel bandwidth. Unless indicated elsewhere, the Table below specifies the emission masks for equipment operating in the frequency bands governed under this part.

Applicable Emission Masks		
Frequency band (MHz)	Mask for equipment with audio low pass filter	Mask for equipment without audio low pass filter
Below 25 [1]	A or B	A or C
25-50	B	C
72-76	B	C
150-174 [2]	B, D, or E	C, D, or E
150 Paging-only	B	C
220-222	F	F
421-512 [2]	B, D, or E	C, D, or E
450 Paging-only	B	G
806-821/851-866	B	G
821-824/866-869	B	H
896-901/935-940	I	J
902-928	K	K
929-930	B	G
Above 940	B	C
All other bands	B	C

[1] Equipment using single sideband J3E emission must the requirements of Emission Mask A. Equipment using other emissions must meet the requirements of Emission Mask B or C, as applicable.

[2] Equipment designed to operate with a 25 kHz channel bandwidth must meet the requirements of Emission Mask B or C, as applicable. Equipment designed to operate with a 12.5 kHz channel bandwidth must meet the requirements of Emission Mask D, and equipment designed to operate with a 6.25 kHz channel bandwidth must meet the requirements of Emission Mask E.

(a) **Emission Mask A.** For transmitters utilizing J3E emission, the carrier must be at least 40 dB below the peak envelope power and the power of emissions must be reduced below the output power (P in watts) of the transmitter as follows:

(1) On any frequency removed from the assigned frequency by more than 50 percent, but not more than 150 percent of the authorized bandwidth: **At least 25 dB.**

(2) On any frequency removed from the assigned frequency by more than 150 percent, but not more than 250 percent of the authorized bandwidth: **At least 35 dB.**

(3) On any frequency removed from the assigned frequency by more than 250 percent of the authorized bandwidth: **At least 43 + 10 log P dB.**

(b) **Emission Mask B.** For transmitters that are **equipped** with an audio low-pass filter pursuant to § 90.211(a), the power of any emission must be below the unmodulated carrier power (P) as follows:

(1) On any frequency removed from the assigned frequency by more than 50 percent, but not more than 100 percent of the authorized bandwidth: **At least 25 dB.**

(2) On any frequency removed from the assigned frequency by more than 100 percent, but not more than 250 percent of the authorized bandwidth: **At least 35 dB.**

(3) On any frequency removed from the assigned frequency by more than 250 percent of the authorized bandwidth: **At least 43 + 10 log (P) dB.**

(c) **Emission Mask C.** For transmitters that are **not equipped** with an audio low-pass filter pursuant to § 90.211(b), the power of any emission must be attenuated below the unmodulated carrier output power (P) as follows:

(1) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 5 kHz, but not more than 10 kHz: **At least 83 log (f_d/5) dB;**

(2) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 10 kHz, but not more than 250 percent of the authorized bandwidth: **At least 29 log (f_d^2/11) dB or 50 dB, whichever is the lesser attenuation;**

(3) On any frequency removed from the center of the authorized bandwidth by more than 250 percent of the authorized bandwidth: **At least 43 + 10 log (P) dB.**

(d) **Emission Mask D - 12.5 kHz channel bandwidth equipment.** For transmitters designed to operate with a 12.5 kHz channel bandwidth, any emission must be attenuated below the power (P) of the highest emission contained within the authorized bandwidth as follows:

(1) On any frequency from the center of the authorized bandwidth f_0 to 5.625 kHz removed from f_0: **Zero dB.**

(2) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 5.625 kHz but no more than 12.5 kHz: **At least 7.27(f_d- 2.88 kHz) dB.**

(3) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 12.5 kHz: **At least 50 + 10 log (P) dB or 70 dB, whichever is the lesser attenuation.**

(4) The reference level for showing compliance with the emission mask shall be established using a resolution bandwidth sufficiently wide (usually two to three times the channel bandwidth) to capture the true peak emission of the equipment under test. In order to show compliance with the emissions mask up to and including 50 kHz removed from the edge of the authorized bandwidth, adjust the resolution bandwidth to 100 Hz with the measuring instrument in a peak hold mode. A sufficient number of sweeps must be measured to insure that the emission profile is developed. If video filtering is used, its bandwidth must not be less than the instrument resolution bandwidth. For emissions beyond 50 kHz from the edge of the authorized bandwidth see paragraph (l) of this section. If it can be shown that use of the above instrumentation settings do not accurately represent the true interference potential of the equipment under test, then an alternate procedure may be used provided prior Commission approval is obtained.

(e) **Emission Mask E - 6.25 kHz or less channel bandwidth equipment.** For transmitters designed to operate with a 6.25 kHz or less bandwidth, any emission must be attenuated below the power (P) of the highest emission contained within the authorized bandwidth as follows:

(1) On any frequency from the center of the authorized bandwidth f_0 to 3.0 kHz removed from f_0: **Zero dB.**

(2) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 3.0 kHz but no more than 4.6 kHz: **At least 30 + 16.67(f_d - 3 kHz) or 55 + 10 log (P) or 65 dB, whichever is the lesser attenuation.**

(3) On any frequency removed from the center of the authorized bandwidth by more than 4.6 kHz: **At least 55 + 10 log (P) or 65 dB, whichever is the lesser attenuation.**

(4) The reference level for showing compliance with the emission mask shall be established using a resolution bandwidth sufficiently wide (usually two to three times the channel bandwidth) to capture the true peak emission of the equipment under test. In order to show compliance with the emissions mask up to and including 50 kHz removed from the edge of the authorized bandwidth, adjust the resolution bandwidth to 100 Hz with the measuring instrument in a peak hold mode. A sufficient number of sweeps must be measured to insure that the emission profile is developed. If video filtering is used, its bandwidth must not be less than the instrument resolution bandwidth. For emissions beyond 50 kHz from the edge of the authorized bandwidth see paragraph (l) of this section. If it can be shown that use of the above instrumentation settings do not accurately represent the true interference potential of the equipment under test, then an alternate procedure may be used

provided prior Commission approval is obtained.

(f) **Emission Mask F.** For transmitters operating in the 220-222 MHz frequency band, any emission must be attenuated below the power (P) of the highest emission contained within the authorized bandwidth as follows:

(1) On any frequency from the center of the authorized bandwidth f_o to the edge of the authorized bandwidth f_e: **Zero dB.**

(2) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 2 kHz up to and including 3.75 kHz: **30 + 20(f_d -2) dB or 55 + 10 log (P), or 65 dB, whichever is the lesser attenuation.**

(3) On any frequency beyond 3.75 kHz removed from the center of the authorized bandwidth f_d: **At least 55 + 10 log (P) dB.**

(g) **Emission Mask G.** For transmitters that are **not equipped** with an audio low-pass filter pursuant to § 90.211(b), the power of any emission must be attenuated below the unmodulated carrier power (P) as follows:

(1) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 5 kHz, but no more than 10 kHz: **At least 83 log (f_d/5) dB;**

(2) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 10 kHz, but no more than 250 percent of the authorized bandwidth: **At least 116 log (f_d/6.1) dB, or 50 + 10 log (P) dB, or 70 dB, whichever is the lesser attenuation;**

(3) On any frequency removed from the center of the authorized bandwidth by more than 250 percent of the authorized bandwidth: **At least 43 + 10 log (P) dB.**

(h) **Emission Mask H.** For transmitters that are **not equipped** with an audio low-pass filter pursuant to § 90.211(b), the power of any emission must be attenuated below the unmodulated carrier power (P) as follows:

(1) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (f_d in kHz) of 4 kHz or less: **Zero dB.**

(2) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 4 kHz, but no more than 8.5 kHz: **At least 107 log (f_d/4) dB;**

(3) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 8.5 kHz, but no more than 15 kHz: **At least 40.5 log (f_d/1.16) dB;**

(4) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 15 kHz, but no more than 25 kHz: **At least 116 log (f_d/6.1) dB;**

(5) On any frequency removed from the center of the authorized bandwidth by more than 25 kHz: **At least 43 + log (P) dB.**

(i) **Emission Mask I.** For transmitters that are equipped with an audio low pass filter pursuant to § 90.211(a), the power of any emission must be attenuated below the unmodulated carrier power of the transmitter (P) as follows:

(1) On any frequency removed from the center of the authorized bandwidth by a displacement frequency of more than 6.8 kHz, but no more than 9.0 kHz: **At least 25 dB;**

(2) On any frequency removed from the center of the authorized bandwidth by a displacement frequency of more than 9.0 kHz, but no more than 15 kHz: **At least 35 dB;**

(3) On any frequency removed from the center of the authorized bandwidth by a displacement frequency of more than 15 kHz: **At least 43 + 10 log (P) dB, or 70 dB, whichever is the lesser attenuation.**

(j) **Emission Mask J.** For transmitters that are **not equipped** with an audio low-pass filter pursuant to § 90.211(b), the power of any emission must be attenuated below the unmodulated carrier power of the transmitter (P) as follows:

(1) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 2.5 kHz, but no more than 6.25 kHz: **At least 53 log (f_d/2.5) dB;**

(2) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 6.25 kHz, but no more than 9.5 kHz: **At least 103 log (f_d/3.9) dB;**

(3) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 9.5 kHz: **At least 157 log (f_d/5.3) dB, or 50 + 10 log (P) dB or 70 dB, whichever is the lesser attenuation.**

(k) **Emission Mask K.** For transmitters authorized under Subpart M that operate in the 902-928 MHz band, the peak power of any emission shall be attenuated below the power

of the highest emission contained within the licensee's LMS sub-band in accordance with the following schedule:

(1) On any frequency within the authorized bandwidth: **Zero dB.**

(2) On any frequency outside the licensee's LMS sub-band edges (as identified in paragraph (k)(5) of this section): **55 + 10 log(P) dB**, where (P) is the highest emission (watts) of the transmitter inside the licensee's LMS sub-band.

(3) The resolution bandwidth of the instrumentation used to measure the emission power shall be 100 kHz. If a video filter is used, its bandwidth shall not be less than the resolution bandwidth.

(4) Emission power (P) shall be measured in peak values.

(5) The LMS sub-band edges for multilateration systems for which emissions must be attenuated are 904.00, 909.75, 919.75, 921.75, 927.50, 927.75 and 928.00 MHz. If the 919.75-921.75 and 921.75-927.25 MHz sub-bands are aggregated by a single licensee, the emission mask limitations at the band edges at 921.75 and 927.50 MHz may be ignored. The LMS sub-band edges for non-multilateration systems for which emissions must be attenuated are 902.00, 904.00, 909.75 and 921.75 MHz.

(l) **Other frequency bands.** Transmitters designed for operation under this part on frequencies other than listed in this section must meet the emission mask requirements of Emission Mask B. Equipment operating under this part on frequencies allocated to but shared with the Federal Government, must meet the applicable Federal Government technical standards.

(m) **Instrumentation.** The reference level for showing compliance with the emission mask shall be established, except as indicated in Sections 90.210 (d), (e), and (k), using standard engineering practices for the modulation characteristic used by the equipment under test. For measuring emissions up to and including 50 kHz from the edge of the authorized bandwidth, adjust the resolution bandwidth to 100 Hz with the measuring instrument in a peak hold mode. A sufficient number of sweeps must be measured to insure that the emission profile is developed. If video filtering is used, its bandwidth must not be less than the instrument resolution bandwidth. For frequencies more than 50 kHz removed from the edge of the authorized bandwidth a resolution of at least 10 kHz must be used for frequencies below 1000 MHz. Above 1000 MHz the resolution bandwidth of the instrumentation must be at least 1 MHz. If it can be shown that use of the above instrumentation settings do not accurately represent the true interference potential of the equipment under test, then an alternate procedure may be used provided prior Commission approval is obtained.

29. Section 90.211 is revised to read as follows:

§ 90.211 Modulation requirements.

Each transmitter must meet the requirements provided in paragraphs (a) or (b) of this section. The requirements of this paragraph do not apply to mobile stations that are authorized to operate with a maximum power output of 2 watts or less.

(a) Transmitters utilizing **analog emissions** that are equipped with an audio low-pass filter and must meet the emission limitations specified in § 90.210 under all possible conditions of operation.

(b) Transmitters utilizing **digital or analog emissions** without an audio low-pass filter must be tested for type acceptance using the digital or analog modulating signal or signals specified by the Part 2 of the rules. The type acceptance application must contain such information as may be necessary to demonstrate that the transmitter complies with the emission limitations specified in § 90.210.

30. Section 90.213 is revised to read as follows:

§ 90.213 Frequency stability.

(a) Unless noted elsewhere, transmitters used in the services governed by this part must have a minimum frequency stability as specified in the following Table.

Minimum Frequency Stability
parts per million (ppm)

Frequency range (MHz)	Fixed and base stations	Mobile stations	
		Over 2 watts output power	2 watts or less output power
Below 25	100 [1, 2, 3]	100	200
25 - 50	20	20	50
72 - 76	5	—	50
150 - 174	5 [5, 11]	5 [6]	5 [4, 6]
220 - 222	0.1	1.5	1.5
421 - 512	5 [7, 11]	5 [8]	5 [8]
806 - 821	1.5	2.5	2.5
821 - 824	1.0	1.5	1.5
851 - 866	1.5	2.5	2.5
866 - 869	1.0	1.5	1.5
896 - 901	0.1	1.5	1.5
902 - 928	2.5	2.5	2.5
929 - 930	1.5	—	—
935 - 940	0.1	1.5	1.5
1427 - 1435	300 [9]	300	300
Above 2450 [10]	—	—	—

[1] Fixed and base stations with over 200 watts transmitter power must have a frequency stability of 50 ppm except for equipment used in the Public Safety Radio Services where the frequency stability is 100 ppm.

[2] For single sideband operations below 25 MHz, the carrier frequency must be maintained within 50 Hz of the authorized carrier frequency.

[3] Travelers information station transmitters operating from 530-1700 kHz and transmitters exceeding 200 watts peak envelope power used for disaster communications and long distance circuit operations pursuant to §§ 90.242 and 90.264 must maintain the carrier frequency to within 20 Hz of the authorized frequency.

[4] Stations operating in the 154.45 to 154.49 MHz or the 173.2 to 173.4 MHz bands must have a frequency stability of 5 ppm.

[5] In the 150-174 MHz band, fixed and base stations with a 12.5 kHz channel bandwidth must have a frequency stability of 2.5 ppm. Fixed and base stations with a 6.25 kHz channel bandwidth must have a frequency stability of 1.0 ppm.

[6] In the 150-174 MHz band, mobile stations designed to operate with a 12.5 kHz channel bandwidth or designed to operate on a frequency specifically designated for itinerant use or designed for low-power operation of two watts or less, must have a frequency stability of 5 ppm. Mobile stations designed to operate with a 6.25 kHz channel bandwidth must have a frequency stability of 1.0 ppm.

[7] In the 421-512 MHz band, fixed and base stations with a 12.5 kHz channel bandwidth must have a frequency stability of 1.5 ppm. Fixed and base stations with a 6.25 kHz channel bandwidth must have a frequency stability of 0.1 ppm.

[8] In the 421-512 MHz band, mobile stations designed to operate with a 12.5 kHz channel bandwidth or designed to operate on a frequency specifically designated for itinerant use or designed for low-power operation of two watts or less, must have a frequency stability of 2.5 ppm. Mobile stations designed to operate with a 6.25 kHz channel bandwidth must have a frequency stability of 0.5 ppm.

[9] Fixed stations with output powers above 120 watts and necessary bandwidth less than 3 kHz must operate with a frequency stability of 100 ppm. Fixed stations with output powers less than 120 watts and using time-division multiplex, must operate with a frequency stability of 500 ppm.

[10] Frequency stability to be specified in the station authorization.

[11] Paging transmitters operating on paging-only frequencies must operate with frequency stability of 5 ppm in the 150 -174 MHz band and 2.5 ppm in the 421-512 MHz band.

(b) For the purpose of determining the frequency stability limits, the power of a transmitter is considered to be the maximum rated output power as specified by the manufacturer.

31. Section 90.214 is added to read as follows:

§ 90.214 Transient Frequency Behavior.

In the 150-174 MHz and 421-512 MHz frequency bands, transient frequencies must be within the maximum frequency difference limits during the time intervals indicated:

Transient Frequency Behavior For Equipment Designed To Operate on 25 kHz Channels

Time Intervals [1,2]	Maximum Frequency Difference [3]	Frequency Ranges (MHz)					
		Base Stations and Portable Radios			Mobile Radios		
		150 to 174	450 to 500	500 to 512	150 to 174	450 to 500	500 to 512
t_1 [4]	± 25.0 kHz	5.0 ms	10.0 ms	20.0 ms	5.0 ms	10.0 ms	5.0 ms
t_2	± 12.5 kHz	20.0 ms	25.0 ms	50.0 ms	20.0 ms	25.0 ms	20.0 ms
t_3 [4]	± 25.0 kHz	5.0 ms	10.0 ms	10.0 ms	5.0 ms	10.0 ms	5.0 ms

Transient Frequency Behavior For Equipment Designed To Operate on 12.5 kHz Channels

Time Intervals [1,2]	Maximum Frequency Difference [3]	Frequency Ranges (MHz) All Equipment		
		150 to 174	450 to 500	500 to 512
t_1 [4]	± 12.5 kHz	5.0 ms	10.0 ms	20.0 ms
t_2	± 6.25 kHz	20.0 ms	25.0 ms	50.0 ms
t_3 [4]	± 12.5 kHz	5.0 ms	10.0 ms	10.0 ms

Transient Frequency Behavior For Equipment Designed To Operate on 6.25 kHz Channels

Time Intervals [1,2]	Maximum Frequency Difference [3]	Frequency Ranges (MHz) All Equipment		
		150 to 174	450 to 500	500 to 512
t_1 [4]	± 6.25 kHz	5.0 ms	10.0 ms	20.0 ms
t_2	± 3.125 kHz	20.0 ms	25.0 ms	50.0 ms
t_3 [4]	± 6.25 kHz	5.0 ms	10.0 ms	10.0 ms

[1] t_{on} is the instant when a 1 kHz test signal is completely suppressed, including any capture time due to phasing.
t_1 is the time period immediately following t_{on}.
t_2 is the time period immediately following t_1.
t_3 is the time period from the instant when the transmitter is turned off until t_{off}.
t_{off} is the instant when the 1 kHz test signal starts to rise.

[2] During the time from the end of t_2 to the beginning of t_3, the frequency difference must not exceed the limits specified in § 90.213.

[3] Difference between the actual transmitter frequency and the assigned transmitter frequency.

[4] If the transmitter carrier output power rating is 6 watts or less, the frequency difference during this time period may exceed the maximum frequency difference for this time period.

32. Section 90.217 is revised to read as follows:

§ 90.217 Exemption from technical standards.

(a) Except as noted herein, transmitters used at stations licensed in the Business Radio Service which have an output power not exceeding 120 milliwatts are exempt from the technical requirements set out in this subpart, but must instead comply with the following:

(b) For equipment designed to operate with a 20 kHz channel bandwidth, the sum of the bandwidth occupied by the emitted signal plus the bandwidth required for frequency stability shall be adjusted so that any emission appearing on a frequency 40 kHz or more removed from the assigned frequency is attenuated at least 30 dB below the unmodulated carrier.

(c) For equipment designed to operate with a 12.5 kHz channel bandwidth, the sum of the bandwidth occupied by the emitted signal plus the bandwidth required for frequency stability shall be adjusted so that any emission appearing on a frequency 25 kHz or more removed from the assigned frequency is attenuated at least 30 dB below the unmodulated carrier.

(d) For equipment designed to operate with a 6.25 kHz channel bandwidth, the sum of the bandwidth occupied by the emitted signal plus the bandwidth required for frequency stability shall be adjusted so that any emission appearing on a frequency 12.5 kHz or more removed from the assigned frequency is attenuated at least 30 dB below the unmodulated carrier.

(e) Transmitters may be operated in the continuous carrier transmit mode.

33. Section 90.238 is amended by revising paragraph (e) to read as follows:

§ 90.238 Telemetry operations.

* * * * *

(e) In the 450-470 MHz band, telemetry operations will be authorized on a secondary basis with a transmitter output power not to exceed 2 watts on frequencies subject to the limitations in the following paragraphs:

90.17 (c)(24)	90.63 (d)(24)	90.79 (d)(23)
90.19 (c)(26)	90.65 (c)(41)	90.81 (d)(11)
90.21 (c)(16)	90.67 (c)(36)	90.89 (c)(21)
90.23 (c)(18)	90.69 (c)(12)	90.91 (c)(18)
90.25 (c)(22)	90.71 (c)(12)	90.93 (c)(15)
90.27 (c)(2)	90.73 (d)(35)	90.95 (d)(18)
90.53 (b)(30)	90.75 (c)(24)	

* * * * *

34. Section 90.243 is amended by revising paragraph (b)(2) to read as follows:

§ 90.243 Mobile relay operation.

* * * * *

(b) * * *

(1) * * *

(2) In the Business Radio Service, mobile relay stations may be authorized on frequencies below 450 MHz when those frequencies are reserved for low-power operation of 2 watts or less. Such stations will be authorized a maximum output power not to exceed one watt and the mobile relay antenna system may not be more than 13 m (40 ft) above the ground.

* * * * *

35. Section 90.257 is amended by revising the introductory text in paragraph (b) to read as follows:

§ 90.257 Assignment and use of frequencies in the band 72-76 MHz.

* * * * *

(b) The following criteria governs the authorization and use of frequencies in the 72-76 MHz band by mobile stations in the Special Industrial, Manufacturers, Forest Products, Railroad, Power, Petroleum, and Business Radio Services.

* * * * *

36. Section 90.261 is amended by revising the list of frequencies in paragraph (f) to read as follows:

§ 90.261 Assignment and use of the frequencies in the band 450-470 MHz for fixed operations.

* * * * *

(f) Secondary fixed operations * * *

451.800/456.800
451.80625/456.80625
451.8125/456.8125
451.81875/456.81875

452.525
452.53125
452.5375
452.54375
452.550
452.55625
452.5625
452.56875
452.575
452.58125
452.5875
452.59375
452.600
452.60625
452.6125
452.61875
452.925/457.925
452.93125/457.93125
452.9375/457.9375
452.94375/457.94375
452.950/457.950
452.95625/457.95625
452.9625/457.9625
452.96875/457.96875

453.025/458.025
453.03125/458.03125
453.0375/458.0375
453.04375/458.04375
453.075/458.075
453.08125/458.08125
453.0875/458.0875
453.09375/458.09375
453.125/458.125
453.13125/458.13125
453.1375/458.1375
453.14375/458.14375
453.175/458.175

453.18125/458.18125
453.1875/458.1875
453.19375/458.19375

454.000/459.000
454.00625/459.00625
454.0125/459.0125
454.01875/459.01875

462.950/467.950
462.95625/467.95625
462.9625/467.9625
462.96875/467.96875
462.975/467.975
462.98125/467.98125
462.9875/467.9875
462.99375/467.99375
463.000/468.000
463.00625/468.00625
463.0125/468.0125
463.01875/468.01875
463.025/468.025
463.03125/468.03125
463.0375/468.0375
463.04375/468.04375
463.050/468.050
463.05625/468.05625
463.0625/468.0625
463.06875/468.06875
463.075/468.075
463.08125/468.08125
463.0875/468.0875
463.09375/468.09375
463.100/468.100
463.10625/468.10625
463.1125/468.1125
463.11875/468.11875
463.125/468.125
463.13125/468.13125
463.1375/468.1375
463.14375/468.14375
463.150/468.150
463.15625/468.15625
463.1625/468.1625
463.16875/468.16875
463.175/468.175
463.18125/468.18125
463.1875/468.1875
463.19375/468.19375

* * * * *

37. Section 90.267 is revised to read as follows:

§ 90.267 Assignment and use of frequencies in the 450-470 MHz band for low-power use.

(a) Any regularly assignable frequency in the 450-470 MHz band listed in the tables in Subparts B, C, D, and E, may be designated as a low-power channel in a defined geographic area by the frequency coordinator of the service in which the frequency is available. These channels are subject to the following conditions.

(1) For channels available in more than one radio service, concurrence for low-power designation must be obtained from coordinators of all such services.

(2) For channels available in more than one radio service, the frequency coordination requirements in § 90.175 apply in all such services.

(3) The maximum authorized bandwidth for these frequencies is 6 kHz.

(4) Stations are limited to 2 watts output power.

(5) Wide area operations will not be authorized. The area of normal day-to-day operations will be described in the application in terms of maximum distance from a geographical center (latitude and longitude).

(6) Each coordinator must maintain a list of all channels it designates for low-power use and the geographic areas where such channels are available.

(i) The coordinator must make this list available to the public upon request.

(b) Frequencies separated by 3.125 kHz from regularly assignable frequencies in the 450-470 MHz band listed in the Tables in subparts B, C, D, and E, may be assigned in accordance with the following conditions:

(1) All stations will be licensed as mobiles but may serve the functions of base, fixed, or mobile relay stations. Stations are limited to 2 watts output power.

(2) All operations will be on a secondary basis to the primary operations (3.125 kHz removed) and shall be entitled to no protection from primary stations.

(3) The frequency coordination requirements in § 90.175 apply for all channels available under this section. For channels which are between primary channels available to more than one service of this section, the frequency coordination requirements in § 90.175

apply in all such services:

(4) Wide area operations will not be authorized. The area of normal day-to-day operations will be described in the application in terms of maximum distance from a geographical center (latitude and longitude).

(5) Applicants for stations under this section must specify base, mobile, or fixed operation, but are otherwise exempt from any limitation on the number of frequencies assignable contained elsewhere in Part 90.

(6) Antennas of mobile stations used as fixed stations communicating with one or more associated stations located within 45 degrees of azimuth shall be directional and have a front to back ratio of at least 15 dB. Except as provided below, the height of the antenna used at any mobile station serving as a base, fixed or mobile relay station may not exceed 7 m. (20 ft) above the ground level.

(i) No limit shall be placed on the length or height above ground level of any commercially manufactured radiating transmission line when the transmission line is terminated in a non-radiating load and is routed at least 7 m. (20 ft) interior to the edge of any structure or is routed below ground level.

(ii) Only sea-based stations, and central alarm stations operating on frequencies allocated for central station protection operations, may utilize antennas mounted not more than 7 m. (20 ft.) above a man-made supporting structure, including antenna structures.

(7) A hospital or health care institution holding a license to operate a radio station under this part may operate a medical radio telemetry device with an output power not to exceed 20 milliwatts without specific authorization from the Commission. All licensees operating under this authority must comply with the requirements and limitations set forth in this section.

(8) No assignment will be made on a frequency immediately adjacent to non-private radio service allocations.

(9) Frequencies from 462.7375 MHz to 462.9375 MHz and 464.9875 MHz to 465.0125 MHz are not available for authorization.

(10) Frequencies from 460.900 MHz to 461.01875 MHz and 465.900 MHz to 466.01875 MHz are available only for listed central station protection services and subject to § 90.75(c)(27) and (41).

38. Section 90.271 is deleted.

39. Section 90.273 is amended by revising paragraph (a) to read as follows:

§ 90.273 Availability and use of frequencies in the 421-430 MHz band.

* * * * *

(a) The following tables list frequencies available for assignment in the public safety, business or industrial/land transportation pools as indicated. In the tables, the public safety pool is denoted as "PS", the business pool as "B", and the industrial/land transportation pool as "I/LT." The frequencies 422.19375 MHz through 424.99375 MHz are paired with frequencies 427.19375 MHz through 429.99375 MHz, respectively. Only the lower half of each frequency pair, available for base station operation, is listed in the tables. Corresponding mobile and control station frequencies are 5 MHz higher than the base station frequency. The frequencies 425.000 through 425.48125 are unpaired and are available for either single frequency dispatch or paging operations.

Table 1 - Channels Available in Detroit and Cleveland Areas Only

Frequency (MHz)	Pool in which assigned
Paired channels:	
422.19375*	I/LT
422.200	I/LT
422.20625*	I/LT
422.21250	I/LT
422.21875*	I/LT
422.225	I/LT
422.23125*	I/LT
422.23750	I/LT
422.24375*	I/LT
422.250	I/LT
422.25625*	I/LT
422.26250	I/LT
422.26875*	I/LT
422.275	I/LT
422.28125*	I/LT
422.28750	I/LT
422.29375*	I/LT
422.300	I/LT
422.30625*	I/LT
422.31250	I/LT
422.31875*	I/LT
422.325	I/LT
422.33125*	I/LT
422.33750	I/LT
422.34375*	I/LT
422.350	I/LT
422.35625*	I/LT
422.36250	I/LT
422.36875*	I/LT
422.375	I/LT
422.38125*	I/LT
422.38750	I/LT
422.39375*	I/LT
422.400	I/LT
422.40625*	I/LT
422.41250	I/LT
422.41875*	I/LT
422.425	I/LT
422.43125*	I/LT
422.43750	I/LT
422.44375*	I/LT
422.450	I/LT
422.45625*	I/LT
422.46250	I/LT
422.46875*	I/LT
422.475	I/LT
422.48125*	I/LT
422.48750	I/LT
422.49375*	I/LT
422.500	I/LT
422.50625*	I/LT
422.51250	I/LT
422.51875*	I/LT
422.525	I/LT
422.53125*	I/LT
422.53750	I/LT
422.54375*	I/LT
422.550	I/LT
422.55625*	I/LT
422.56250	I/LT
422.56875*	I/LT
422.575	I/LT
422.58125*	I/LT
422.58750	I/LT
422.59375*	I/LT
422.600	B
422.60625*	B

Frequency (MHz)	Pool in which assigned
422.61250	B
422.61875*	B
422.625	B
422.63125*	B
422.63750	B
422.64375*	B
422.650	B
422.65625*	B
422.66250	B
422.66875*	B
422.675	B
422.68125*	B
422.68750	B
422.69375*	B
422.700	B
422.70625*	B
422.71250	B
422.71875*	B
422.725	B
422.73125*	B
422.73750	B
422.74375*	B
422.750	B
422.75625*	B
422.76250	B
422.76875*	B
422.775	B
422.78125*	B
422.78750	B
422.79375*	B
422.800	B
422.80625*	B
422.81250	B
422.81875*	B
422.825	B
422.83125*	B
422.83750	B
422.84375*	B
422.850	B
422.85625*	B
422.86250	B
422.86875*	B
422.875	B
422.88125*	B
422.88750	B
422.89375*	B
422.900	B
422.90625*	B
422.91250	B
422.91875*	B
422.925	B
422.93125*	B
422.93750	B
422.94375*	B
422.950	B
422.95625*	B
422.96250	B
422.96875*	B
422.975	B

Frequency (MHz)	Pool in which assigned
422.98125*	B
422.98750	B
422.99375*	B
423.000	PS
423.00625*	PS
423.01250	PS
423.01875*	PS
423.025	PS
423.03125*	PS
423.03750	PS
423.04375*	PS
423.050	PS
423.05625*	PS
423.06250	PS
423.06875*	PS
423.075	PS
423.08125*	PS
423.08750	PS
423.09375*	PS
423.100	PS
423.10625*	PS
423.11250	PS
423.11875*	PS
423.125	PS
423.13125*	PS
423.13750	PS
423.14375*	PS
423.150	PS
423.15625*	PS
423.16250	PS
423.16875*	PS
423.175	PS
423.18125*	PS
423.18750	PS
423.19375*	PS
423.200	PS
423.20625*	PS
423.21250	PS
423.21875*	PS
423.225	PS
423.23125*	PS
423.23750	PS
423.24375*	PS
423.250	PS
423.25625*	PS
423.26250	PS
423.26875*	PS
423.275	PS
423.28125*	PS
423.28750	PS
423.29375*	PS
423.300	PS
423.30625*	PS
423.31250	PS
423.31875*	PS
423.325	PS
423.33125*	PS
423.33750	PS
423.34375*	PS

Frequency (MHz)	Pool in which assigned
423.350	PS
423.35625*	PS
423.36250	PS
423.36875*	PS
423.375	PS
423.38125*	PS
423.38750	PS
423.39375*	PS
423.400	PS
423.40625*	PS
423.41250	PS
423.41875*	PS
423.425	PS
423.43125*	PS
423.43750	PS
423.44375*	PS
423.450	PS
423.45625*	PS
423.46250	PS
423.46875*	PS
423.475	PS
423.48125*	PS
423.48750	PS
423.49375*	PS
423.500	PS
423.50625*	PS
423.51250	PS
423.51875*	PS
423.525	PS
423.53125*	PS
423.53750	PS
423.54375*	PS
423.550	PS
423.55625*	PS
423.56250	PS
423.56875*	PS
423.575	PS
423.58125*	PS
423.58750	PS
423.59375*	PS
423.600	PS
423.60625*	PS
423.61250	PS
423.61875*	PS
423.625	PS
423.63125*	PS
423.63750	PS
423.64375*	PS
423.650	PS
423.65625*	PS
423.66250	PS
423.66875*	PS
423.675	PS
423.68125*	PS
423.68750	PS
423.69375*	PS
423.700	PS
423.70625*	PS
423.71250	PS
423.71875*	PS
423.725	PS
423.73125*	PS
423.73750	PS
423.74375*	PS
423.750	PS
423.75625*	PS
423.76250	PS
423.76875*	PS
423.775	PS
423.78125*	PS
423.78750	PS
423.79375*	PS
423.800	PS
423.80625*	PS

* This frequency is not available until August 16, 1996. After August 16, 1996 this frequency will be assigned with an authorized bandwidth not to exceed 6 kHz.

Table 2 - Channels Available in Buffalo, Detroit and Cleveland Areas

Frequency (MHz)	Pool in which assigned
Paired channels:	
423.81875*	PS
423.825	PS
423.83125*	PS
423.83750	PS
423.84375*	PS
423.850	PS
423.85625*	PS
423.86250	PS
423.86875*	PS
423.875	PS
423.88125*	PS
423.88750	PS
423.89375*	PS
423.900	PS
423.90625*	PS
423.91250	PS
423.91875*	PS
423.925	PS
423.93125*	PS
423.93750	PS
423.94375*	PS
423.950	PS
423.95625*	PS
423.96250	PS
423.96875*	PS
423.975	PS
423.98125*	PS
423.98750	PS
423.99375*	PS
424.000	PS
424.00625*	PS
424.01250	PS

Frequency (MHz)	Pool in which assigned
424.01875*	PS
424.025	PS
424.03125*	PS
424.03750	PS
424.04375*	PS
424.050	PS
424.05625*	PS
424.06250	PS
424.06875*	PS
424.075	PS
424.08125*	PS
424.08750	PS
424.09375*	PS
424.100	PS
424.10625*	PS
424.11250	PS
424.11875*	PS
424.125	PS
424.13125*	PS
424.13750	PS
424.14375*	PS
424.150	PS
424.15625*	PS
424.16250	PS
424.16875*	PS
424.175	PS
424.18125*	PS
424.18750	PS
424.19375*	PS
424.200	PS
424.20625*	PS
424.21250	PS
424.21875*	PS
424.225	PS
424.23125*	PS
424.23750	PS
424.24375*	PS
424.250	PS
424.25625*	PS
424.26250	PS
424.26875*	PS
424.275	PS
424.28125*	PS
424.28750	PS
424.29375*	PS
424.300	PS
424.30625*	PS
424.31250	PS
424.31875*	PS
424.325	PS
424.33125*	PS
424.33750	PS
424.34375*	PS
424.350	PS
424.35625*	PS
424.36250	PS
424.36875*	PS
424.375	PS
424.38125*	PS
424.38750	PS
424.39375*	PS
424.400	I/LT
424.40625*	I/LT
424.41250	I/LT
424.41875*	I/LT
424.425	I/LT
424.43125*	I/LT
424.43750	I/LT
424.44375*	I/LT
424.450	I/LT
424.45625*	I/LT
424.46250	I/LT
424.46875*	I/LT
424.475	I/LT
424.48125*	I/LT
424.48750	I/LT
424.49375*	I/LT
424.500	I/LT
424.50625*	I/LT
424.51250	I/LT
424.51875*	I/LT
424.525	I/LT
424.53125*	I/LT
424.53750	I/LT
424.54375*	I/LT
424.550	I/LT
424.55625*	I/LT
424.56250	I/LT
424.56875*	I/LT
424.575	I/LT
424.58125*	I/LT
424.58750	I/LT
424.59375*	I/LT
424.600	I/LT
424.60625*	I/LT
424.61250	I/LT
424.61875*	I/LT
424.625	I/LT
424.63125*	I/LT
424.63750	I/LT
424.64375*	I/LT
424.650	I/LT
424.65625*	I/LT
424.66250	I/LT
424.66875*	I/LT
424.675	I/LT
424.68125*	I/LT
424.68750	I/LT
424.69375*	I/LT
424.700	B
424.70625*	B
424.71250	B
424.71875*	B
424.725	B
424.73125*	B
424.73750	B
424.74375*	B
424.750	B

Frequency (MHz)	Pool in which assigned
424.75625*	B
424.76250	B
424.76875*	B
424.775	B
424.78125*	B
424.78750	B
424.79375*	B
424.800	B
424.80625*	B
424.81250	B
424.81875*	B
424.825	B
424.83125*	B
424.83750	B
424.84375*	B
424.850	B
424.85625*	B
424.86250	B
424.86875*	B
424.875	B
424.88125*	B
424.88750	B
424.89375*	B
424.900	B
424.90625*	B
424.91250	B
424.91875*	B
424.925	B
424.93125*	B
424.93750	B
424.94375*	B
424.950	B
424.95625*	B
424.96250	B
424.96875*	B
424.975	B
424.98125*	B
424.98750	B
424.99375*	B
Single channels:	
425.000	B
425.00625*	B
425.01250	B
425.01875*	B
425.025	B
425.03125*	B
425.03750	B
425.04375*	B
425.050	B
425.05625*	B
425.06250	B
425.06875*	B
425.075	B
425.08125*	B
425.08750	B
425.09375*	B
425.100	B
425.10625*	B
425.11250	B

Frequency (MHz)	Pool in which assigned
425.11875*	B
425.125	I/LT
425.13125*	I/LT
425.13750	I/LT
425.14375*	I/LT
425.150	I/LT
425.15625*	I/LT
425.16250	I/LT
425.16875*	I/LT
425.175	I/LT
425.18125*	I/LT
425.18750	I/LT
425.19375*	I/LT
425.200	I/LT
425.20625*	I/LT
425.21250	I/LT
425.21875*	I/LT
425.225	I/LT
425.23125*	I/LT
425.23750	I/LT
425.24375*	I/LT
425.250	PS
425.25625*	PS
425.26250	PS
425.26875*	PS
425.275	PS
425.28125*	PS
425.28750	PS
425.29375*	PS
425.300	PS
425.30625*	PS
425.31250	PS
425.31875*	PS
425.325	PS
425.33125*	PS
425.33750	PS
425.34375*	PS
425.350	PS
425.35625*	PS
425.36250	PS
425.36875*	PS
425.375	PS
425.38125*	PS
425.38750	PS
425.39375*	PS
425.400	PS
425.40625*	PS
425.41250	PS
425.41875*	PS
425.425	PS
425.43125*	PS
425.43750	PS
425.44375*	PS
425.450	PS
425.45625*	PS
425.46250	PS
425.46875*	PS
425.475	PS
425.48125*	PS

* This frequency is not available until August 16, 1996. After August 16, 1996 this frequency will be assigned with an authorized bandwidth not to exceed 6 kHz.

* * * * *

40. Section 90.311 is amended by revising paragraph (a) and paragraph (b) to read as follows:

§ 90.311 Frequencies.

(a) Except as provided for in § 90.315, the following frequencies in the band 470-512 MHz may be assigned to eligibles in the services as indicated below. The first and last assignable frequencies are shown. Assignable frequencies occur in increments of 6.25 kHz. The separation between base and mobile transmit frequencies is 3 MHz for two frequency operations.

Urbanized Area (Channel Assignment)	Public Safety Pool		Industrial Pools						Petroleum, Forest Products, and Manufacturers Radio Service		Land Transportation Pools				General Access Pool	
	Fire, Police, Local Government, Highway Maintenance, Forestry Conservation, and Emergency Medical Radio Services		Power and Telephone Maintenance Radio Service		Special Industrial Radio Service		Business Radio Service				Railroad, Motor Carrier, and Automobile Emergency Radio Service		Taxicab Radio Service			
	Base and Mobile	Mobile	Base and Mobile	Mobile	Base and Mobile	Mobile	Base and Mobile	Mobile	Base and Mobile	Mobile	Base and Mobile	Mobile	Base and Mobile	Mobile	Base and Mobile	Mobile
Boston																
Ch. 14	470.30625 to 471.14375	473.30625 to 474.14375	471.30625 to 471.39375	474.30625 to 474.39375	471.45625 to 471.49375	474.45625 to 474.49375	471.80625 to 472.06875 and 472.10625 to 472.21875 and 472.25625 to 472.26875	474.80625 to 475.06875 and 475.10625 to 475.21875 and 475.25625 to 475.26875	None	None	472.45625 to 472.54375 and 472.58125 to 472.69375 and 472.73125 to 472.74375 and 472.78125 to 472.79375	475.45625 to 475.54375 and 475.58125 to 475.69375 and 475.73125 to 475.74375 and 475.78125 to 475.79375	472.35625 to 472.44375	475.35625 to 475.44375	470.30625 to 472.99375	473.30625 to 475.99375
Ch. 16	482.30625 to 483.14375	485.30625 to 486.14375	None	None	483.48125 to 484.34375	486.48125 to 487.34375	None	None	None	None	None	None	None	None	482.30625 to 484.99375	485.30625 to 487.99375
Chicago																

h. 14	470.30625 to 471.14375	473.30625 to 474.14375	None	None	471.43125 to 471.64375	474.43125 to 474.64375	471.80625 to 472.34375 and 472.63125 to 472.79375 and 472.90625 to 472.91875 and 472.95625 to 472.96875 and 472.98125 to 472.99375	474.80625 to 475.34375 and 475.63125 to 475.79375 and 475.90625 to 475.91875 and 475.95625 to 475.96875 and 475.98125 to 475.99375	472.80625 to 472.81875	475.80625 to 475.81875	472.45625 to 472.61875 and 472.93125 to 472.94375	475.45625 to 475.61875 and 475.93125 to 475.94375	None	None	470.30625 to 472.99375	473.30625 to 475.99375
h. 15	None	None	None	None	None	None	None	None	None	None	None	None	None	None	476.30625 to 478.99375	479.30625 to 481.99375
Cleveland																
h. 14	None	None	None	None	None	None	None	None	None	None	None	None	None	None	470.30625 to 472.99375	473.30625 to 475.99375
h. 15	None	None	None	None	None	None	None	None	None	None	None	None	None	None	476.30625 to 478.99375	479.30625 to 481.99375
Detroit																
h. 15	None	None	None	None	None	None	None	None	None	None	None	None	None	None	476.30625 to 478.99375	479.30625 to 481.99375
h. 16	None	None	None	None	None	None	None	None	None	None	None	None	None	None	482.30625 to 484.99375	485.30625 to 487.99375
Los Angeles																
h. 14	470.05625 to 471.13125	473.05625 to 474.14375	471.30625 to 471.31875 and 471.40625 to 471.41875	474.30625 to 474.31875 and 474.40625 to 474.41875	471.43125 to 471.64375	474.43125 to 474.64375	471.15625 to 471.29375 and 471.65625 to 472.44375	474.15625 to 474.29375 and 474.65625 to 475.44375	472.83725 to 472.89375	475.83725 to 475.89375	472.45625 to 472.79375	475.45625 to 475.79375	472.98125 to 472.99375	475.98125 to 475.99375	470.30625 to 472.99375	473.30625 to 475.99375

Ch. 16	482.00625 to 484.99375	485.00625 to 487.99375	None	None	None	None	None	None	None	None	None	None	None	None	None	None
Ch. 20	506.30625 to 507.26875	509.30625 to 510.26875	507.30625 to 507.40625	510.30625 to 510.40625	507.43125 to 507.64375	510.43125 to 510.64375	507.65625 to 508.44375 and 507.28125 to 507.29375	510.65625 to 511.44375 and 510.28125 to 510.29375	508.80625 to 508.89375	511.80625 to 511.89375	508.45625 to 508.79375	511.45625 to 511.79375	508.90625 to 508.91875	511.90625 to 511.91875	506.30625 to 508.99375	509.30625 to 511.99375
New York																
Ch. 14	470.30625 to 471.41875	473.30625 to 474.41875	472.95625 to 472.96875 and 472.98125 to 472.99375	475.95625 to 475.96875 and 475.98125 to 475.99375	471.43125 to 471.64375	474.43125 to 474.64375	471.65625 to 472.34375 and 472.75625 to 472.89375	474.65625 to 475.34375 and 475.75625 to 475.89375	None	None	472.45625 to 472.61875	475.45625 to 475.61875	472.35625 to 472.44375 and 472.63125 to 472.66875 and 472.73125 to 472.74375 and 472.68125 to 472.69375	475.35625 to 475.44375 and 475.63125 to 475.66875 and 475.73125 to 475.74375 and 475.68125 to 475.69375	470.30625 to 472.99375	473.30625 to 475.99375
Ch. 15	476.30625 to 477.40625	479.30625 to 480.40625	478.95625 to 478.99375	481.95625 to 481.99375	477.43125 to 477.64375	480.43125 to 480.64375	477.65625 to 478.34375 and 478.75625 to 478.89375	480.65625 to 481.34375 and 481.75625 to 481.89375	None	None	478.30625 to 478.69375 and 478.68125 to 478.69375	481.30625 to 481.69375 and 481.68125 to 481.69375	478.35625 to 478.66875	481.35625 to 481.66875	476.30625 to 478.99375	479.30625 to 481.99375
Philadelphia																

Ch. 19	500.30625 to 500.44375 and 500.55625 to 500.56875 and 500.65625 to 500.66875 and 500.68125 to 500.69375 and 500.73125 to 500.74375 and 500.78125 to 500.91875 and 500.95625 to 500.96875 and 500.98125 to 500.99375 and 501.05625 to 501.06875 and 501.10625 to 501.11875 and 501.13125 to 501.14375	503.30625 to 503.44375 and 503.55625 to 503.56875 and 503.65625 to 503.66875 and 503.68125 to 503.69375 and 503.73125 to 503.74375 and 503.78125 to 503.91875 and 503.95625 to 503.96875 and 503.98125 to 503.99375 and 504.05625 to 504.06875 and 504.10625 to 504.11875 and 504.13125 to 504.14375	None	None	501.43125 to 501.49375 and 501.53125 to 501.54375 and 501.60625 to 501.61875	504.43125 to 504.49375 and 504.53125 to 504.54375 and 504.60625 to 504.61875	501.80625 to 502.34375	504.80625 to 505.34375	None	None	502.45625 to 502.79375	505.45625 to 505.79375	None	None	500.30625 to 502.99375	503.30625 to 505.99375

Ch. 20	None	None	None	None	None	None	507.80625 to 508.19375 and 508.23125 to 508.34375	510.80625 to 511.19375 and 511.23125 to 511.34375	None	None	None	None	None	None	506.30625 to 508.99375	509.30625 to 511.99375
Pittsburgh																
Ch. 14	None	None	None	None	None	None	471.80625 to 471.81875	474.80625 to 474.81875	None	None	None	None	None	None	470.30625 to 472.99375	473.30625 to 475.99375
Ch. 18	None	None	None	None	None	None	None	None	None	None	None	None	None	None	494.30625 to 496.99375	497.30625 to 499.99375
San Francisco																

Ch. 16	482.30625 to 482.31875 and 482.33125 to 482.34375 and 482.38125 to 482.49375 and 482.53125 to 482.54375 and 482.55625 to 482.56875 and 482.60625 to 482.61875 and 482.68125 to 482.76875 and 482.80625 to 482.91875 and 482.95625 to 482.96875 and 483.00625 to 483.01875	485.30625 to 485.31875 and 485.33125 to 485.34375 and 485.38125 to 485.49375 and 485.53125 to 485.54375 and 485.55625 to 485.56875 and 485.60625 to 485.61875 and 485.68125 to 485.76875 and 485.80625 to 485.91875 and 485.95625 to 485.96875 and 486.00625 to 486.01875	None	None	483.43125 to 483.64375	486.43125 to 486.64375	483.80625 to 484.34375	486.80625 to 487.34375	None	None	484.45625 to 484.79375	487.45625 to 487.79375	None	None	482.30625 to 484.99375	485.30625 to 487.99375

Ch. 17	488.35625 to 488.46875 and 488.50625 to 488.51875 and 488.55625 to 488.56875 and 488.60625 to 488.69375 and 488.73125 to 488.74375 and 488.76125 to 488.77375 and 488.83125 to 488.84375 and 488.85625 to 488.86875 and 488.90625 to 488.91875 and 488.95625 to 488.96875 and 489.00625 to 489.06875 and 489.10625 to	491.35625 to 491.46875 and 491.50625 to 491.51875 and 491.55625 to 491.56875 and 491.60625 to 491.69375 and 491.73125 to 491.74375 and 491.76125 to 491.77375 and 491.83125 to 491.84375 and 491.85625 to 491.86875 and 491.90625 to 491.91875 and 491.95625 to 491.96875 and 491.00625 to 491.06875 and 491.10625 to	None	None	489.43125 to 489.64375	492.43125 to 492.64375	488.80625 to 489.33125	491.80625 to 492.33125	490.83125 to 490.48375 and 490.85625 to 490.86875 and 490.90625 to 490.91875 and 490.95625 to 490.96875	493.83125 to 493.48375 and 493.85625 to 493.86875 and 493.90625 to 493.91875 and 493.95625 to 493.96875	490.45625 to 490.56875 and 490.60625 to 490.66875 and 490.70625 to 490.71875 and 490.75625 to 490.76875	493.45625 to 493.56875 and 493.60625 to 493.66875 and 493.70625 to 493.71875 and 493.75625 to 493.76875	None	None	488.30625 to 490.99375	491.30625 to 493.99375

Washington,DC Th. 17	488.30625 to 488.31875	491.30625 to 491.91875	None	None	None	None	None	None	None	None	None	None	None	None	488.30625 to 490.99375	491.30625 to 493.99375
Th. 18	494.30625 to 495.41875	497.30625 to 498.41875	None	None	495.58125 to 495.64375	498.58125 to 498.64375	495.68125 to 496.21875	498.68125 to 499.21875	None	None	496.45625 to 496.61875	499.45625 to 499.61875	496.35625 to 496.39375	499.35625 to 499.39375	494.30625 to 496.99375	497.30625 to 499.99375

* * *

(3) The following frequencies will be authorized a maximum bandwidth of 6 kHz.

Channel	Frequency
14	470.30625
	475.99375
15	476.30625
	481.99375
16	482.30625
	487.99375
17	488.30625
	493.99375
18	494.30625
	499.99375
19	500.30625
	505.99375
20	506.30625
	511.99375

* * * * *

(b) Miami, FL, Dallas, TX, and Houston, TX urbanized area.

Channel 14 (Miami)	Channel 16 (Dallas)	Channel 17 (Houston)
470.30625 to 475.99375	482.30625 to 487.99375	488.30625 to 493.99375

* * *

(2) Base station frequencies for the Petroleum, Forest Products, and Manufacturers Radio Services will be assigned serially beginning at 470.30625 MHz for Miami, 482.30625 MHz for Dallas, and 488.30625 MHz for Houston and progressing upward from those points a channel at a time.

* * *

(4) Base station frequencies for the Business Radio Service will be assigned serially beginning at 470.30625, 471.2625, and 472.3625 MHz for Miami, 483.6125 and 483.1375 MHz for Dallas, and 489.6625 MHz and 490.3625 MHz for Houston and progressing, a channel at a time from those points. Mobile station frequencies are 3 MHz higher than the

corresponding base station frequencies. Normally, each channel shall be substantially filled before the next channel is assigned.

* * * * *

41. Section 90.315 is amended by revising paragraphs (j), (l), and (m) to read as follows:

§ 90.315 Special provisions governing use of frequencies in the 470-494 MHz band (TV Channels 15, 16, 17) in the Southern Louisiana-Texas Offshore Zone.

* * * * *

(j) The following frequency bands are available for assignment in all services for use in the Zones as defined in paragraph (a) of this section.

PAIRED FREQUENCIES (MHZ)

Zone	Transmit (or receive)	Receive (or transmit)
A	490.01875 - 490.98125	493.01875 - 493.98125
B	484.01875 - 484.98125	487.01875 - 487.98125
C	478.01875 - 478.98125	481.01875 - 481.98125

Only the first and last assignable frequencies are shown. Frequencies shall be assigned in pairs with 3 MHz spacing between transmit and receive frequencies. Assignable frequency pairs will occur in increments of 6.25 kHz. The following frequencies will be assigned for a maximum authorized bandwidth of 6 kHz: 478.01875, 478.98125, 484.01875, 484.98125, 490.01875, 490.98125, 481.01875, 481.98125, 487.01875, 487.98125, 493.01875, and 493.98125.

* * * * *

(l) (Reserved)

(m) (Reserved)

42. Section 90.357 is amended by revising the second sentence of note 1 in paragraph (a)(1) to read as follows:

§ 90.357 Frequencies for LMS systems in the 902-928 MHz band.

(a) * * *

(1) * * *

[1] * * * However, the maximum allowable power in these sub-bands is 30 watts ERP in accordance with Section 90.205(j).

43. Section 90.555 is deleted.

* * * * *

44. Section 90.741 is amended by revising the table heading to read as follows:

§ 90.741 Urban areas for nationwide systems.

* * * * *

TABLE

Urban area	North Latitude	West Longitude
	° ' "	° ' "

* * * * *

APPENDIX G

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 90 - PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 302, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 302, 303, and 332, unless otherwise noted.

2. Section 90.175 is amended by revising paragraph (a) to read as follows:

§ 90.175 Frequency coordination requirements.

* * * * *

(a) For frequencies between 25 and 470 MHz: A statement from the applicable frequency coordinator recommending the most appropriate frequency. The coordinator's recommendation may include comments on technical factors such as power, antenna height and gain, terrain and other factors which may serve to minimize potential interference. Tables 1 and 2 in § 90.193 must be used by coordinators to determine co-channel station distance separations between stations participating in a negotiated exclusivity agreement and those stations that are not participating in a negotiated exclusivity agreement. Frequencies in the 450 - 470 MHz band, when used for secondary fixed operations, shall be assigned and coordinated pursuant to § 90.261.

* * * * *

3. Section 90.189 is added to read as follows:

§ 90.189 Shared Exclusivity - 150-170, 421-430, and 450-470 MHz Bands

(a) To promote spectrally efficient technologies (e.g. trunking, TDMA, etc.) and to increase quality of service for licensees, assignments may be limited on certain frequencies in a specific geographic area as set out in §§ 90.190 - 90.193

4. Section 90.190 is added to read as follows:

§ 90.190 User Agreements

Co-channel licensees, operating in the same geographical area can, by mutual agreement, develop sharing arrangements on their currently licensed frequency or frequencies

that would facilitate their use of advanced technology. The following guidelines will apply to the development of these sharing agreements:

(1) This agreement must be unanimous among all licensees on a given frequency or frequencies within the composite service area, irrespective of the radio service to which each user belongs. Any license application forwarded from a frequency coordinator to the Commission, prior to the date that the coordinator is notified, in writing, of a licensee action to negotiate an agreement will be considered, for the purposes of the agreement, an existing licensee and must be included in the agreement.

(2) All agreements must be finalized by August 31, 2000. Each participant of the plan must agree to utilize equipment designed to operate single mode with a maximum channel bandwidth of 6.25 kHz or equipment designed to operate single mode with a channel bandwidth of 12.5 kHz provided that it meets the efficiency standard of one communication channel per 6.25 kHz within 5 years after an agreement is finalized.

(3) A 90 day temporary freeze on the assignment of new licensees on a given frequency or frequencies will be made when a licensee, who desires to negotiate with other co-channel users to enter a sharing agreement, notifies all frequency coordinators who have cognizance of that frequency. This notification must be in writing and include:

(i) The frequency or frequencies under consideration.

(ii) A description of all co-channel licensees who must be a party to the agreement. This description will include: a list of all affected co-channel licensees, their base station locations (latitude and longitude), their current service areas, and their exclusivity service area.

(A) The exclusivity service area for each licensee will be defined as a point radius centered on their base station. The maximum radius defining the size of the exclusivity service area will consistant with the specifications of § 90.205.

(4) During the temporary freeze on new licenses in the exclusivity service area, no new licenses will be granted without the consent of all existing users within this area. Co-channel licenses will be granted outside of the exclusivity service area at minimum distances as determined by the tables of § 90.193. Existing licensees who are located outside of the composite service area and closer than the minimum distance to this area as specified by the tables of § 90.193 may continue to operate on a co-primary basis with all licensees inside the composite service area.

(5) If at the completion of the 90 day period, a unanimous agreement is not reached among all licensees, the freeze on new authorizations on the frequency or frequencies within this area will be lifted. No licensee who is located within the exclusivity service area may file a new notification to temporarily freeze this frequency or frequencies in this area for a

minimum of one calendar year from the date the temporary freeze expires. All parties are still free to negotiate an agreement, but must include any new licensees who are located within the composite service area.

(6) If prior to or at the completion of the 90 day period, a unanimous agreement is reached among all licensees, the freeze on new authorizations on this frequency or frequencies in this composite service area will be made permanent. No new licenses will be granted on this frequency or frequencies in the exclusivity service area without the consent of participants in the agreement, but systems subject to the agreement can be modified, expanded, or renewed. Existing licensees who are located outside of the exclusivity service area and closer than the minimum distance to this area as specified by the tables of § 90.193 may continue to operate on a co-primary basis with all licensees inside the exclusivity service area.

(i) The final agreement will be filed with all cognizant frequency coordinators. This agreement will include:

(A) The frequency or frequencies which are covered under the agreement.

(B) Signatures of all parties to the agreement.

(C) A description of all co-channel licensees who must be a party to the agreement. This description will include: a list of all affected co-channel licensees, their base station locations (latitude and longitude), their current service areas, and their exclusivity service area.

(D) A plan for complying with the requirement to employ narrowband technology within five (5) years from the agreement date.

(ii) The coordinator must make this agreement available to the public upon request.

(iii) New co-channel licenses will not be granted closer to the composite service area than the minimum distances determined by the tables in § 90.193.

(iv) If a licensee expands a system after an agreement is negotiated and filed with the cognizant frequency coordinators, then any portion of the expanded service area which falls outside of the composite service area of the agreement, will not be afforded the protection of the tables in § 90.193 from co-channel licensees, unless a new agreement which includes the expanded area is negotiated.

5. Section 90.191 is added to read as follows:

§ 90.191 Sell or Lease of Excess Capacity

Licensees who participate in a sharing plan and have fully converted their systems to narrowband or equivelent operation may lease excess capacity of their systems.

6. Section 90.193 is added to read as follows:

§ 90.193 Shared Exclusivity Separation Distances

The minimum distance between an existing base station that is included in a negotiated exclusivity agreement and a proposed co-channel station not included in the agreement will be determined from Tables 1 and 2.

Table 1: 150-174 MHz - Minimum Distance (km) between Existing Base Stations and Proposed Stations [1]

Proposed service area (km)	Existing station service area radius (km) [2]									
	3	8	13	16	24	32	40	48 [3]	64 [3]	80 [3]
3	16	27	45	60	84	90	100	111	138	162
8	27	32	50	64	88	95	105	118	143	164
13	45	50	55	69	93	100	110	122	148	169
16	60	64	69	70	97	103	113	130	151	172
24	84	88	93	97	105	111	121	134	160	180
32	90	95	100	103	111	119	129	142	167	188
40	100	105	110	113	121	129	140	150	176	196
48 [3]	111	118	122	126	134	142	150	158	184	204
64 [3]	138	143	148	151	160	167	176	184	194	220
80 [3]	162	164	169	172	180	188	196	204	220	237

[1] Distances are based upon 37 dBu desired and 19 dBu undesired signal strengths and are derived from FCC Report R-6602, Figs. 19 and 20 (See § 73.699, Figs. 10 and 10a)

[2] For those stations licensed before August 1, 1996, whose authorizations do not include a service area radius or area of operation, the service areas will be determined from Table 1 using the station's authorized transmitter power increased by 3 dB or its actual ERP when given, and the antenna height above sea level in lieu of HAAT, or the HAAT if given.

[3] Permitted only for base stations located 200 km (125 mi) or more from the center of markets 1-60 as listed in § 90.741. Applicants for such systems must demonstrate that the signal strength at the edge of their service area does not exceed 37 dBu.

Table 2: 421-430, 450-470 MHz - Minimum Distance between Existing Base Stations and Proposed Stations [1]

Proposed service area (km)	Existing station service area radius (km) [2]									
	3	8	13	16	24	32	40 [3]	48 [3]	64 [3]	>64 [3]
3	16	27	43	55	68	80	97	111	155	180
8	27	32	48	60	72	85	101	118	159	185
13	43	48	53	64	77	90	106	122	164	190
16	55	60	64	68	80	93	109	126	167	194
24	68	72	77	80	89	101	118	134	175	201
32	80	85	90	93	101	109	126	142	184	209
40 [3]	97	101	106	109	118	126	134	150	192	217
48 [3]	111	118	122	126	134	142	150	158	200	225
64 [3]	155	159	164	167	175	184	192	200	216	242
>64 [3]	180	185	190	193	201	209	217	225	241	253

[1] Distances are based upon 37 dBu desired and 19 dBu undesired signal strengths and are derived from FCC Report R-6602, Figs. 19 and 20 (See § 73.699, Figs. 10 and 10a)

[2] For those stations licensed before August 1, 1996, whose authorizations do not include a service area radius or area of operation, the service areas will be determined from Table 1 using the station's authorized transmitter power increased by 3 dB or its actual ERP when given, and the antenna height above sea level in lieu of HAAT, or the HAAT if given.

[3] Permitted only for base stations located 200 km (125 mi) or more from the center of markets 1-60 as listed in § 90.741. Applicants for such systems must demonstrate that the signal strength at the edge of their service area does not exceed 37 dBu.

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